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Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1621

SENATOR JOHN L. McCLELLAN, *et al.*,
Petitioners,

v.

ALAN McSURELY and MARGARET McSURELY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

PRELIMINARY STATEMENT

The case before the Court is but another step in the litigation, now more than 10 years old, which was triggered by an outrageous violation of the constitutional rights of a law-abiding and courageous young couple. Following that invasion of their rights, the McSurelys were subjected to criminal prosecutions by state and federal governments, which prosecutions were also found to be in violation of their constitutional rights. See, McSurely v. Ratliff, 282 F. Supp. 848 (E.D. Ky.,

1967) (state prosecution); United States v. McSurely, 473 F. 2d 1178 (D.C. Cir., 1972) (federal prosecution). 1/

It took three stays by this Court (389 U.S. 949 [1967]; 390 U.S. 412 [1968]; 390 U.S. 914 [1968]), and ultimately District and Sixth Circuit decisions before the McSurelys could even obtain the return of papers and documents which had been unlawfully seized from them. See, McSurely v. Ratliff, 398 F. 2d 817 (6th Cir., 1968).

The issue now before the Court emerges out of the efforts of this husband and wife, who have suffered serious actual damages, to vindictate their constitutional rights by a civil action against those who violated them.

In this litigation, the McSurelys are faced with a claim that the federal legislative officials who violated their rights are above the law and not accountable to the courts because of a broad and extreme claim of legislative immunity which is comparable to the claims of executive immunity asserted and rejected in United States v. United States District Court, 407 U.S. 297 (1972), and United States v. Nixon, 418 U.S. 683 (1974).

As of this date the issues in this case have generated the following opinions of the Court of Appeals for the District of Columbia Circuit: McSurely v. McClellan, 426 F. 2d 664 (1970) (Pet. App. 19la); 521 F. 2d 1024 (1975) (Pet. App. 13la); 553 F. 2d 1277 (1976) (Pet. App. la).

In the face of an egregious denial of constitutional rights, the factual presentation in petitioners'

1/ The long saga of this case has been told in a series of articles in The New Yorker published in November, 1975, since republished as a portion of Richard Harris's FREEDOM SPENT (Little, Brown and Company, Boston, 1976).

brief is so distorted as to require a detailed counter-statement of the case by respondents.

ADDITIONAL CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

COUNTER-STATEMENT OF THE CASE

The initial action against the McSurelys and the litigation which halted the Kentucky prosecution

On August 11, 1967, the respondents, Alan and Margaret McSurely, were the object of an unconstitutional search and seizure by Kentucky prosecutive officials operating under an unconstitutional law. The search and seizure group of some 14 men was led by Thomas Ratliff, the non-federal defendant herein. 2/ The materials which were seized consisted of a massive quantity of books, records and documents, many of which were of a plainly personal nature. 3/

The seizure

> "included the personal clothing of Mrs. McSurely, boxes of office supplies, cancelled checks, unused checkbooks, college examination and review notes, the McSurelys' personal love letters, and their marriage certificate.

2/ Mr. Ratliff filed an Answer but has made no independent motion to dismiss or for summary judgment, nor is he party to the motion made by the federal defendants.

3/ Some idea of the massiveness and oppressiveness of the seizure can be gleaned from the inventory (A. 79-92) (the Appendix prepared by the government, consisting of 149 pages in two separate volumes paginated sequentially, will be cited herein as "A." without volume reference).

> One box contained 104 copies of Handbill Literature, all of which was published by the Commonwealth of Kentucky. There were 564 loose books impounded, which included "Tricks and Training for Cats," several books of poetry, one of which was "Poetry and Prose" by William Cullen Bryant, and the "Washington Yellow Page Telephone Directory." In essence the McSurely home was ransacked and [they] were cleaned out of all their papers and books." United States v. McSurely, supra, 473 F. 2d at 1187-88, emphasis by court.

The background for this raid and seizure is set forth in the Amended and Supplemental Complaint, 4/ as follows:

4/ The case comes before the Court in the posture of a review of the denial of a motion to dismiss or, in the alternative, for summary judgment, which was supported by only one affidavit, that of Senator McClellan (A. 51). None of the other defendants filed affidavits. The McSurelys filed an affidavit in response to that of Senator McClellan (A. 54).

The sources of facts for this case at this state of the proceedings, in addition to the Amended and Supplemental Complaint, are the following:

- Affidavits of Senator McClellan and of the McSurelys, referred to above
- Stipulations entered into on December 5, 1967 (A. 19, A. 22)
- The entire Appendix in the criminal appeal in United States v. McSurely, which was made part of the record in this case (Pet. App. 6a, n. 7), some portions of which have been printed in the Appendix. Where reference is made in this brief

[Footnote continued on next page.]

Alan and Margaret McSurely settled in April of 1967 in Pikeville, Pike County, Kentucky, and became employed by the Southern Conference Education Fund (SCEF). The people who live in the area of Appalachia where Pike County is located are among the poorest in the nation, despite the fact that Pike County is the largest coal-producing county in the region. Pikeville, county seat of Pike County, is the headquarters of the National Independent Coal Operators Association (NICOA), which represents the interests of all the non-union coal mine owners in Eastern Kentucky. Defendant Ratliff has major coal mining interests of his own in Pike County and was instrumental in creating NICOA. (A. 27.)

The McSurelys began activity in Pike County, working with both black and white citizens to organize politically to improve their social, political, and economic conditions. They were involved in opposition to coal mine operators in general and to the non-union NICOA in particular. 5/ They started to "investigate the socio-eco-political

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[Footnote continued from previous page:]
to any portion not printed in the Appendix, the citation will be to "U.S. v. McSurely Trial Tr."

- Supplemental affidavits of the McSurelys, dated November 23 and December 2, 1974 (A. 57, A. 65)

- Jurisdictional statement in McSurely v. Ratliff, No. 1113, October Term, 1967.

5/ A key issue in the community was strip-mining. See offer of proof by Dan Jack Combs, Pikeville attorney (U.S. v. McSurely Trial Tr., 377).

milieu of Pike County, 'to inform the people of their rights,' and to help local citizens 'organize to overcome their problems.'" McSurely v. Ratliff, supra, 282 F. Supp at 850.

On the afternoon of August 11, 1967, Mr. Ratliff, acting under color of his office as Commonwealth Attorney for Pike County, met with Robert Holcomb, president of NICOA and the Pike County Chamber of Commerce; the County Sheriff; several members of the Chamber of Commerce; the County Fiscal Court; and others. At this meeting, it is alleged in the Complaint, Mr. Ratliff suggested that raids be made on the McSurely home as well as that of one Joseph Mulloy (then an organizer for the Appalachian Volunteers, a private non-profit corporation funded primarily by the U.S. Office of Economic Opportunity for the purpose of assisting the poor people in Eastern Kentucky, Virginia, and West Virginia). Mr. Ratliff also suggested that Mulloy and Alan McSurely be arrested and their books, documents, and other records be seized. Later the same afternoon, closed hearings were held in the Pike County Court House, as a result of which, arrest and search warrants were issued with respect to Mulloy and Alan McSurely, based upon KRS 432.040, an anti-sedition statute. 6/ (A. 28.)

Later that evening, Mr. Ratliff led his raiding party into the home of the McSurelys. When he discovered that Margaret McSurely, then five

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6/ Eleven years earlier, the Supreme Court of Appeals of Kentucky had applied the principles of pre-emption to prosecutions for sedition under that statute. See, Braden v. Commonwealth, 291 S.W. 2d 843 (1956).

months pregnant, had once worked for the Student Non-Violent Coordinating Committee, he ordered a member of the raiding party to prepare an arrest warrant for her, too. After about two hours of rifling through personal belongings of the McSurelys, Mr. Ratliff at about 11 P. M. personally transported Alan and Margaret McSurely to the county jail and ordered the sheriff to seize practically every scrap of paper in their home. (A. 28-29, A. 79-92.)

Following their arrest, the McSurelys filed a complaint in the United States District Court for the Eastern District of Kentucky, challenging the constitutionality of the Kentucky sedition statute and requesting that the matter be heard by a three-judge court, pursuant to 28 U.S.C., §§2281-84. On September 14, 1967, a three-judge court entered an order, one judge dissenting, declaring the Kentucky sedition statute unconstitutional and permanently enjoining further prosecution of the McSurelys thereunder. (A. 77.)

The full opinion of the three-judge federal court, rendered a month after the September 14 order, included the following statement:

> "The conclusion is inescapable that the criminal prosecutions were instituted, at least in part, in order to stop [the McSurelys'] organizing activities in Pike County. That effect has been successful. Not only has there been a 'chilling effect' on freedom of speech referred to in Dombrowski, there has been, in fact, a freezing effect." 282 F. Supp. 848, 852-53.

The court in its order expressly directed the Commonwealth Attorney for Pike County, Ratliff, to continue to hold in "safe keeping" all material seized from the McSurelys until final disposition

of the case by appeal or otherwise (A. 78). No appeal was ever filed. Nevertheless, by reason of circumstances described below, it took another 14 months before the McSurelys obtained the return of their papers.

Inspection, transportation, and receipt by the federal defendants of personal documents of the McSurelys which were to have been held in safe keeping by a U.S. District Court order

The Amended Complaint alleges that at or about the time of the initial unconstitutional raid, the federal defendants, "acting both individually and jointly and/or in conspiracy with each other," and Mr. Ratliff, undertook a plan of action to continue the harassment of the McSurelys, and having among its objectives preventing them from continuing their work 7/ and obtaining their private papers, including personal correspondence with intimate friends "for the private purposes of the defendant McClellan in order to intimidate" the McSurelys and individuals with whom they may have been associated (A. 30-31).

Stipulations and testimony in prior proceedings establish that, directly after he made the raid and commenced his prosecution, Mr. Ratliff announced to the press that the material seized from the McSurelys would be made available to Congressional committees (A. 19). 7a/ Shortly thereafter, Mr.

7/ The McSurelys left Pike County on December 13, 1968, after their house was bombed. Thus, as they allege in the Complaint, "one of the primary aims of the original plan" was effected (A. 37).

7a/ Ratliff was then a candidate for Lt. Governor

[Footnote continued on next page.]

Ratliff was contacted by Lavern Duffy, assistant counsel to the McClellan Committee. In due course, on October 8, 1967, John Brick, an investigator for the Subcommittee, traveled to Pikeville (A.19).

There then developed an unsavory pattern of illicit cooperation between the Kentucky raiders and the staff of the Congressional Committee, fully detailed in the several opinions of the appellate courts which have dealt with this case. See, United States v. McSurely, supra, 473 F. 2d at 1181-83; McSurely v. McClellan, supra (Pet. App. 7a-8a). The Amended Complaint specifically alleges that the actions of Mr. Brick described below were undertaken "upon the instructions of the defendant McClellan and under the supervision of the defendants Adlerman and O'Donnell, but without the full knowledge or approval of the Senate Subcommittee or of the full Senate Committee" (A.31), and that these four federal defendants all acted in conspiracy with each other and with Mr. Ratliff.

The Complaint further alleges that despite the order of the District Court that the seized papers be held in safe keeping, Mr. Brick was given complete access to the papers and he in fact examined them (ibid.). This of course was done without the knowledge of the McSurelys (ibid.) or the approval of the court. 8/

[Footnote continued from previous page:
in the election scheduled to be held three months later in Kentucky.

8/ The statement in the government's brief, p. 4, n. 3, to the effect that Mr. Ratliff received

[Footnote continued on next page.]

Moreover, after a discussion among Messrs. Brick and Ratliff and the latter's assistant, 9/ there were brought to Mr. Brick xerox copies of 234 documents which had been selected from the mass of material seized from the McSurelys (A.31). 10/

[Footnote continued from previous page:]
permission from one of the three judges, the dissenter, to grant access to Mr. Brick of course emphasizes that the court gave no such permission. Besides, even the government's statement is simply not supported by the record. The reference to Judge Leventhal's opinion below (Pet. App. 29a, n. 54) establishes that, while permission from one judge was sought, there is no testimony that permission was granted. Even Judge Wilkey, dissenting, acknowledged that on this record one could not establish permission (Pet. App. 55a, n. 5); his argument was that permission was not necessary.

9/ Though Mr. Brick claimed not to have had any part in the selection of the documents (A.97), the record is quite clear that before the selection was made he had some discussion with Mr. Ratliff and two of his assistants, after which one of them left and returned later with copies of 234 documents (A.20).

10/ The list and title of each document appear at A.116-128. Though the Amended and Supplemental Complaint refers to 242 documents (A.31), it is clear that the correct number is 234.

Inspection of this list reveals that it includes an unusually high percentage of plainly personal items, mostly Margaret's, some Alan's. While in the reported opinions particular attention has been called to item 201, 11/ which is a letter addressed "Dearest Cucumber" and signed "Drew" [Pearson], there are a number of other items relating to Mr. Pearson. See a letter to Margaret addressed "Dear young lady" and signed "P" (item 140); one from Margaret to "Drew" (item 165); a single-page document giving addresses of the Drew Pearson office staff (item 217). There are also numerous other items which on their face are wholly personal. See, e.g., correspondence between Margaret McSurely and her mother or her parents (items 3, 8, 90, 212, 223, 224); a large number of letters to and from friends (items 1, 4, 5, 9, 11, 13, 16 24, 28, 31, 33, 34, 47, 53, 69, 71, 74, 75, 80, 93, 94, 111, 114, 115, 120, 128, 136, 138, 139, 168, 177, 178, 179, 182, 194, 200, 203, 206, 210, 215, 224, 227, 228); and the McSurelys' marriage and birth certificates (items 96, 121, 198).

At the trial of this case, both Mr. and Mrs. McSurely will be able to describe almost all of the items in the list and their testimony will establish the personal nature of the major part of the material.

The record is indisputable that Mr. Brick, at the time he inspected and took these documents, knew that "some of them were" not needed at all "for the performance of [his] duties for the United

11/ The numbers refer to those appearing in the list of documents re-printed (A. 116-128).

States Senate." 12/

12/ There are several suggestions in the government's brief that at the time of inspecting and taking the documents Mr. Brick really did not know that the material was not related to his duties but learned so later. See Gb38; 42, n. 30. This is flatly contradicted by Mr. Brick's own testimony at the trial in United States v. McSurely, as follows:

"Q And when they were handed to you, did you look at what it was that you were receiving?

A Yes.

Q You looked through that whole list?

A Yes.

Q Did you tell Mr. Dotson or any of the folk with whom you met there that there was some of that stuff that you didn't think that you needed?

A Yes.

Q Did you give it back to them?

A No.

Q Did you need that letter signed Dearest Cucumber or addressed, Dearest Cucumber?

***

The Witness: Was the question, did I need that letter?

Mr. Stavis: Yes. For the performance of your duties.

A No, sir.

Q As a matter of fact, in respect to the performance of your duties, you didn't need most of the items in that list, did you?

A Some of them." (A. 101)

Mr. Brick also testified that on the following day he had examined the court file, including the order of the court dated September 14, 1967 (A. 103-4). In spite of his reading of that order, he returned to Washington with those papers 13/ and he testified that he singled out one item from those records to show to Senator McClellan, namely, item 201, the letter addressed "Dearest Cucumber" and signed "Drew" (A. 98) and as to that particular item, the Senator gave Mr. Brick "different instructions ... he told me to put it in an envelope to be marked only to be opened by John Brick ... J.S. Adams [sic; should be "J.S. Adlerman"], General Counsel and Senator McClellan" (A. 100).

The implications of this personal correspondence between Margaret McSurely and Drew Pearson, and the relationships between Margaret McSurely and John Brick through his wife, and between Senator McClellan and Drew Pearson have not yet been fully developed. The McSurelys sought to, but upon vigorous objection by the government, were prevented from presenting these facts, except to a very minor extent, in their criminal trial, United States v. McSurely

13/ The first stipulation of December 5, 1967, seemed to suggest that Mr. Brick returned the papers to Kentucky officials after having screened them (A. 20, par. 9). This was corrected in the further stipulation made on the same day (A. 22, par. 2) and Mr. Brick's testimony at the criminal trial is clear that he took the documents to Washington (A. 97). Judge Leventhal further points out that the government concedes that Mr. Brick took the papers to Washington (Pet. App. 8a, n. 13).

(see Trial Tr., 422-34).

At the trial of this case Margaret McSurely will testify that after her papers were seized by Kentucky officials, and she realized that the Pearson correspondence may have been included in the items taken, she promptly communicated that fact to him. She first learned on December 5, 1967, at a court proceeding in Lexington, Kentucky, that Mr. Brick had copies of some of the records seized from her home (A. 22, par. 2; A. 140). There will also be proof that Mr. Pearson subsequently became aware of the fact that Senator McClellan had obtained copies of compromising correspondence between him and Mrs. McSurely. It will be further established that Drew Pearson and Senator McClellan were bitter enemies and that Mr. Pearson had published a number of columns highly critical of the Senator. Indeed, on August 10, 1967, the day before the illegal Kentucky seizure of some of Margaret McSurely's private papers, Mr. Pearson's widely-read column had strongly attacked Senator McClellan.14/

It will further be established that after Senator McClellan obtained copies of this Pearson

14/ Among exhibits which the McSurelys tried to use at their criminal trial were copies of two articles published in the Drew Pearson column in the Washington Post on August 29, 1966, and August 10, 1967, extremely critical of Senator McClellan.

See, United States v. McSurely Trial Transcript, 444; 1026-1930A.

correspondence and until the date of Mr. Pearson's death in 1968, the latter published nothing critical of Senator McClellan.

It will also be established that Margaret McSurely had for two and a half years, and during the period of her association with Mr. Pearson, been a patient of a Washington, D.C., psychiatrist whose secretary was Mrs. John Brick, wife of the defendant Brick. Mrs. McSurely's communications with her psychiatrist dealt extensively with her relationship with Mr. Pearson, and those communications were both oral and written. She also deposited with the psychiatrist, in order to assist in his treatment of her, a written summary of that relationship (A. 134).

The Amended Complaint alleges that after Mr. Brick returned to Washington with those items of private correspondence he showed them to various members of the Subcommittee staff and others, and made the McSurelys objects of ridicule, derision, and ribald comment (A. 31-32). 15/

The Senate Committee subpoena to Ratliff; the litigation in this Court and the Sixth Circuit which ordered return of their seized documents to the McSurelys

As noted above, the McSurelys were at the time wholly unaware of Mr. Brick's contacts with

15/ Many of the items of Margaret's were so personal that Alan McSurely had not even seen them before their return to the McSurelys on November 8, 1968 (A. 131-32; A. 138). Margaret had kept them in the back of her drawer (A. 137).

Mr. Ratliff and Brick's taking copies of their papers. On or about October 14, 1967, no appeal having been taken, the McSurelys demanded return of their seized papers, which had been held under the safe keeping order pending an appeal (Jurisdictional statement in McSurely v. Ratliff, No. 1113, October Term, 1967, p. 91a). Mr. Ratliff refused to effect a return without a court order, and while delaying the return, he notified the McClellan Committee of the demand (ibid.). Two days later, on October 16, by secret arrangement between Mr. Ratliff and the Committee staff, subpoenas duces tecum directed to Ratliff as well as to the McSurelys were issued (id. at 92a). The Amended Complaint alleges that the defendants McClellan, Adlerman, O'Donnell and Brick had these subpoenas prepared with the hope that Mr. Ratliff would quickly respond, without the possibility of interference by the McSurelys, thereby concealing the fact that the defendants had already inspected all the documents and had taken copies of many of them (A. 32). Since Mr. Brick had already taken McSurely documents to Washington, the only function of the subpoenas, at least as to that material, was to legitimize the secret taking of the materials. 16/

The subpoena was served on Mr. Ratliff on October 17. 16a/ On the morning of October 18, the

16/ There is no evidence that the McSurelys had any other material which was covered by the subpoena. Later on, Mr. Brick made it clear that the Subcommittee by its subpoena sought "in general" the very documents which he had taken (A. 129).

16a/ While the Amended Complaint alleges service on October 15 (A. 32, par. 21), the stipulation fixes the date as October 17.

McSurelys received their subpoenas, 17/ and on the same day filed their motion demanding return of their papers held by Ratliff and further seeking to enjoin his turning the papers over to the McClellan Committee in response to the subpoena served upon him. (Jurisdictional statement, supra, pp. 6a, 9a, 92a.)

In the course of litigation of that motion this Court granted three stays to prevent enforcement of the subpoenas until the District Court could at least hear the matter, 389 U.S. 949; this Court could determine whether it had jurisdiction, 390 U.S. 914; and finally until the Sixth Circuit could determine whether a stay should be continued while it determined the issues, 390 U.S. 412.

On July 29, 1968, the Sixth Circuit, having earlier continued the stay granted by this Court, ordered the documents returned to the McSurelys, with the following forthright statement:

> "The single issue now before this Court is whether the District Court erred in refusing to return to their owners documents which

17/ At the trial the McSurelys will testify that Mr. Brick arrived at their home at breakfast time. This was the first occasion that the McSurelys knew of his interest in their matter. After an exchange of pleasantries, references to Mrs. McSurely's acquaintanceship with Brick's wife, and discussion about the children, Mr. Brick was invited to have a cup of coffee, which he accepted. He then served the subpoenas, assuring the McSurelys that there was no necessity for them to come to Washington and that they would not have to respond to the subpoenas at all because Ratliff had all the papers and would be responding to his subpoena.

> were seized in aid of a prosecution under an unconstitutional statute, now that the time for appeal has expired. We conclude that this question must be answered in the affirmative. The business of the District Court in this case has been completed. The right of the Court to retain possession of the seized documents, which include no contraband, has expired." McSurely v. Ratliff, 398 F. 2d at 818.

The McSurelys finally had their papers returned on November 8, 1968, more than three months later, and then only at the direction of the District Court (Pet. App. 9a).

In the midst of the litigation in Kentucky, Mr. Brick for the first time revealed that he had taken copies of some of the McSurely papers, without benefit of, and prior to the issuance of, the subpoenas. In Lexington, Ky., on December 5, 1967, government counsel in Brick's presence entered into a stipulation which stated that Brick had received and then returned documents (A. 20, pars. 8 and 9) and then a further stipulation stating that "copies of some of the seized documents were made available to Mr. Brick prior to the issuance of the subpoenas" and were "in the possession of the McClellan Committee" (A. 22).

Not until after the conclusion of the litigation when the McSurelys had their documents returned on November 8, 1968, did Mr. Brick reveal the detailed list of what he had taken. 18/ Not until

18/ In his testimony at the criminal trial, Mr. Brick contended that he had actually returned the McSurely papers to Thadeus Scott of Ratliff's office on August 14, 1968 (A. 98). But Mr. Brick was present on November 8, 1968, when the

[Footnote continued on next page.]

the McSurelys prevailed in the Sixth Circuit seven months later as to the enforceability of the subpoena did Senator McClellan and his aides take steps to return what they had surreptitiously taken without any legal process and which they knew from the very beginning included items clearly unrelated to his legislative activity. 19/

Dissemination of materials outside of Congress

The Amended Complaint further alleges that Mr. Brick took the items above mentioned to

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[Footnote continued from previous page:] McSurelys finally received their papers and it was then that he revealed that he had in fact had possession of them when he reviewed with Alan McSurely the receipt that he had obtained from Mr. Scott for the return to him of the McSurely papers (A. 113).

19/ While the government argues that Mr. Brick should have been permitted to take what he thought was irrelevant, leaving it to the Committee to make the decision as to relevance (Gb41-2), there is no hint that during the entire period between the surreptitious taking and the return, any member of the Committee (as distinguished from staff), other than Senator McClellan, was told of Mr. Brick's taking the material. As Judge Leventhal pointed out, "[w]e are not aware that any claim of legislative need has been interposed for the love letter from Drew Pearson to Margaret McSurely" and "[t]here is no indication in the present record that legislative use was made of the letter in question" (Pet. App. 53a).

Washington, D.C., "where he exhibited them to persons whose names are unknown to the plaintiffs, to the damage and embarrassment of the plaintiffs" (A. 31-2).

This generalized allegation took on particularized meaning at the time this case was pending before the Court of Appeals as a result of a disclosure made in an unrelated Freedom of Information suit. Following that disclosure, the McSurelys filed supplemental affidavits dated November 25 and December 2, 1974 (A. 57, A. 65), which show that there was an exchange of data between the Senate Committee and the Internal Revenue Service beginning shortly after the decision of the Court of Appeals for the Sixth Circuit on July 29, 1968, and prior to the actual return of the documents to the McSurelys on November 8, 1968, and that Mr. O'Donnell personally participated therein and Senator McClellan was also directly involved in this process (A. 73).

Of particular significance are two facts: that the contact with the Internal Revenue Service was instigated by the McClellan Committee, and that this contact occurred in August of 1968 (ibid.). In time, the relationship clearly involved access to the Committee files for, in a memorandum of July 29, 1969, Mr. Manuel, staff member of the Committee, on behalf of the Committee on Government Operations, offered to the Internal Revenue Service Activist Organization Committee "the cooperation of the Committee and access to the Committee files." He described the method of filing used by the Committee and stated that "it is planned that IRS representatives will inspect those files as soon as possible" (A. 63). The day after the McSurelys, in response to a subpoena, appeared before the Senate Subcommittee and refused to

turn over their papers, Senator McClellan addressed a communication to the Secretary of the Treasury (A. 70), in which he sought information with respect to 22 organizations, of which nine are involved in documents which had been seized from the McSurelys (A. 66).

The coincidence of both the dates and the content of the material involved in the interchange between the Internal Revenue Service and the McClellan Committee strongly suggests that in fact the McSurely material was transmitted to the Internal Revenue Service by the McClellan Committee. 20/

20/ There is a pregnant footnote in the government's brief which may have been written in anticipation of future disclosures. At n. 8, p. 6. there is a reference to the stay issued by this Court on January 29, 1968. The careful statement that "the stay pertained only to the delivery of the original documents; it did not bar the delivery of photo-copies" suggests that there may well have been some photocopying during this period and delivery of such copies.

Disclaimers of the making of copies, as they appear in testimony and documents, seem extremely narrow. Thus, Mr. Brick testified as follows:

"Q Did you retain any of the documents thereafter or did you make any copy of any documents and retain them in your file?

"A I never made a single copy of any of those documents. I retained none. I have not now and the Subcommittee has none. All the documents were returned to Mr. Thadeus Scott. I have never used a Xerox machine on those documents, although it has been said here a number of times that I did. I did not." (A. 98; underscoring added.)

[Footnote continued on next page.]

The Senate Committee subpoenas to the McSurelys, and their federal criminal prosecutions

On November 8, 1968 - the very day that the McSurelys obtained the return of their papers - Mr. Brick served upon them new Senate Committee subpoenas (very similar to those served the preceding year), directing them to produce their papers before the Senate Committee (A. 33). The McSurelys appeared before the Committee and refused on constitutional grounds to comply with the subpoenas. They were prosecuted for, and convicted of, contempt of Congress. They were ultimately vindicated when their convictions were reversed on the ground that the subpoenas were based upon materials obtained in violation of the Fourth Amendment, United States v. McSurely, 473 F. 2d 1178 (1972). 21/ Judge Wilkey, who

[Footnote continued from previous page:]

Senator McClellan's affidavit of October 26, 1971, merely reiterates that Mr. Brick said the foregoing (A. 50); he makes no statement for himself. Nor did Mr. Brick, the Senator, or any other party disclaim that they permitted other persons to make copies and that copies were in the hands of persons other than the Subcommittee.

21/ Originally, the government contended that the subpoenas were based upon information in addition to that obtained from the examination of the seized material (A. 22, par. 1). But in the course of the criminal trial the government altered its position. As stated by the court in United States v. McSurely, 473 F. 2d at 1190,

[Footnote continued on next page.]

concurred in the result, argued that the materials sought by the subpoena were not pertinent to the Subcommittee's inquiry, 473 F. 2d at 1203-4. 22/

[Footnote continued from previous page:]

"Although it previously took a contrary position, the government has now conceded for purposes of this case that, but for said seizure by the state officials, the subcommittee and its members and agents would not have known of the existence of the documents and hence that the subpoenas directing their production before the subcommittee would not have been issued."

This concession by the government was not made until the McSurelys sought pretrial inspection of documents, pursuant to Rule 17(c), and pretrial depositions (A. 95), and by subpoena sought testimony from Senator McClellan.

22/ Though hardly relevant to the issues now before this Court, the government in its brief has chosen to distort the record and even amplify it beyond that which even Senator McClellan claimed.

Thus, the Court is told that there was a riot in Nashville, Tennessee, and "the subcommittee acquired information that appeared to link respondents to that disturbance" (Gb 4, n. 2). There is absolutely nothing in the record to support either such linkage or even a claim that the Subcommittee acquired information which established such linkage, nor does a reference in the footnote support such linkage. The reference is to a statement in Judge Leventhal's opinion that the McSurelys had stipulated that they attended a meeting of the Board of Directors of the Southern Conference Educational

[Footnote continued on next page.]

The history of this litigation

As explained by the lower court (Pet. App. 9a), the action for damages presently under consideration was originally filed in the District

[Footnote continued from previous page:]

Fund (SCEF) between April 6 and 8, 1967 (A. 21). Reference to the minutes of the meeting which were attached to the stipulation (they appear at U. S. v. McSurely Trial Tr., 1033-36) shows that it was a meeting of the Board of the organization of which the McSurelys were staff members; that the meeting was held at the Methodist Board of Evangelism building; that it opened and concluded with prayer; that the group, including three clergymen, considered a wide range of business, from a proposed budget to the proposed sponsorship of a seminar in law enforcement relating to HEW guidelines for school desegregation. Mr. Stokely Carmichael, "who was in Nashville to speak at Vanderbilt," met with the Board to explain his position on the need for black power in politics and economics." The only action taken in respect to Mr. Carmichael was a resolution supporting his "right to dissent" (id. at 1035).

A description of the disorders that occurred in Nashville is found in Brooks v. Briley, 274 F. Supp. 538 542-46 (M. D. Tenn., 1967) (three-judge court), aff'd., 391 U. S. 361 (1968). Some claim was made that Mr. Carmichael contributed to the disturbances by a speech he made at Vanderbilt University but in all the testimony of City officials in that case, no mention was made of the McSurelys. The McSurelys in fact left Nashville directly after the SCEF Board meeting and were not even in the City when the disturbances occurred!

Court for the District of Columbia on March 4, 1969 - the same day that the McSurelys appeared before the Subcommittee. Later, the District Court issued an order staying all proceedings, to continue in effect until thirty days after final resolution of the criminal case against the McSurelys. On March 26, 1970, the Court of Appeals for the District of Columbia vacated the stay as overbroad, and remanded for further proceedings. McSurely v. McClellan, supra (Pet. App. 195a).

On August 30, 1971, after the criminal trial was had but before reversal of the convictions, the McSurelys were granted leave by the District Court to file an Amended and Supplemental Complaint, which was based partly on evidence developed at the criminal trial and which eliminated some and added other parties defendant. The four named federal defendants were Senator John L. McClellan, Jerome S. Adlerman, Donald F. O'Donnell, and John Brick, the latter three staff members of a Subcommittee of the Committee on Government Operations chaired by Senator McClellan. 23/

23/ Three of the defendants have since died: Mr. Brick on October 15, 1973; Mr. Adlerman on October 1, 1975; and Senator McClellan on or about November 28, 1977.

The issue of the survivability of the cause of action here at issue has not been adjudicated. It was raised sua sponte by the Court of Appeals and at the time both parties expressed the view that the cause of action survives. That court did not decide the issue and remanded it for determination by the District Court (Pet. App. 4a, 44a).

As to Messrs. Brick and Adlerman, there is pending in the District Court a motion to substitute

[Footnote continued on next page.]

Shortly thereafter, the federal defendants filed a motion to dismiss or for summary judgment (A. 45), which the District Court denied on June 12, 1973 (Pet. App. 215a). A motion for reconsideration or certification under 28 U.S.C., §1292(b), was denied on July 9, 1973 (Pet. App. 216a). 24/ An appeal to the Court of Appeals followed.

[Footnote continued from previous page:]
personal representatives. The government opposed the motion on the ground of alleged delay in making the motion, although the record is clear that the decedents' representatives never furnished or filed information which would have triggered a requirement that the McSurelys take steps to effect substitution (see, Rende v. Kay, 415 F. 2d 983 (App. D.C., 1969).

As to Senator McClellan, counsel for the respondents has been advised that the government will be presenting a motion for substitution some time within the month of January, 1978.

24/ In view of stays obtained by the defendants, there has been limited discovery. During the period of its consideration of the motion to dismiss (October, 1971, to June, 1973), the District Court stayed discovery. After the District Court vacated the stay on July 12, 1973, the McSurelys proceeded to depose Mr. O'Donnell on July 10 and Robert E. Dunne, a former employee of the Subcommittee, on August 3. At that time, both Messrs. Brick and Adlerman were already ill and though counsel for the McSurelys expressly demanded notification as to when they could be deposed, no such notice was given. They both died thereafter. No deposition was taken from Senator McClellan. Further discovery came to a halt after the federal defendants filed a notice of appeal on August 6, 1973.

The grounds upon which the federal defendants moved to dismiss or for summary judgment were based upon the Speech or Debate Clause (original motion, A.45; motion for reconsideration, A.148).

The decision below

In a decision since vacated, a majority of a panel of the Court of Appeals for the District of Columbia (Judges Wilkey and Danaher), with Judge Leventhal dissenting, granted summary judgment to the defendants except upon the question of distribution of materials to individuals or agencies outside of Congress. It also left for determination by the District Court the question whether the McSurelys made a claim that the defendants actively collaborated in the original Kentucky raid and, if so, whether there was sufficient evidence to merit a trial on that issue (Pet. App. 131a).

By order of the Court of Appeals, the panel decision was vacated. The case was then heard en banc (Pet. App. 5a) and the court entered these orders:

"(1) Reverses the District Court's failure to grant the motion of the federal defendants to dismiss that part of the complaint relating to the original taking of the McSurelys' books and papers by the Kentucky authorities.

(2) Reverses with directions to grant summary judgment to appellants [federal defendants] on those parts of the complaint that complain of the alleged use made of the documents within Congress, since such use is protected by the Speech or Debate clause.

(3) Affirms the District Court, with remand for further proceedings, on the claim as to alleged dissemination of some of the documents

outside of Congress.

(4) Affirms by an equally divided vote, the District Court's denial of summary judgment on the allegations concerning the action of subcommittee investigator Brick in inspecting the documents and transporting copies of some of them to Washington prior to issuance of a subcommittee subpoena." (Pet. App. 2a-3a.)

As summarized by the lower court, the activities alleged in the Amended Complaint are characterized as falling into seven categories:

"(1) The unlawful search and seizure of the McSurelys' books and papers by Kentucky authorities.

(2) The inspection by Brick of these unlawfully seized materials.

(3) The transport by Brick of copies of 234 documents to Washington.

(4) The inspection of some or all of these 234 copies by the staff of the Subcommittee.

(5) The use of the copies as the basis for issuance of subpoenas for some of the documents.

(6) The procurement of contempt of Congress citations against the plaintiffs by consciously withholding from the Senate the facts relating to the challenged subpoenas.

(7) The dissemination of some or all of the 234 copies obtained by Brick to persons or agencies outside of the Subcommittee - particularly the Internal Revenue Service." (Pet. App. 11a-12a.)

The claims upon which the Court of Appeals was divided included the charges against the federal defendants as they relate to the action of Subcommittee investigator Brick, in conspiracy

with the other defendants, in inspecting the McSurely documents in Kentucky and transporting some of them to Washington prior to the issuance of a subpoena.

In the two major opinions - those of Judges Leventhal and Wilkey - there is agreement upon the fundamental principle that the Speech or Debate Clause does not protect a committee investigator who in the course of preliminary investigative activity engages in a search and seizure in violation of the Fourth Amendment. See, Judge Leventhal's opinion (Pet. App. 19a-20a); Judge Wilkey's opinion (Pet. App. 55a, n. 3). The main issue upon which Judges Leventhal and Wilkey disagreed was whether the conduct of Mr. Brick and the other federal defendants constituted a Fourth Amendment violation. Judge Leventhal and his four colleagues emphasized that based on the pleadings and admitted proofs, which established more than merely "colorable substance" (Pet. App. 22a), Mr. Brick's conduct was that of an active wrongdoer and not that of a mere passive recipient of the product of another party's wrongdoing. Accordingly he held that the McSurelys were entitled to go to trial on their claim that there had been an independent violation of their Fourth Amendment rights by Mr. Brick and those who conspired with him (Pet. App. 25a). Moreover, Judge Leventhal viewed the existence of the safe keeping order of September 14, 1967, as "making all the difference in the world" (Pet. App. 46a) on the question whether Mr. Brick could be charged with a violation of the McSurelys' Fourth Amendment rights, because Mr. Brick took the papers after the court asserted custody over them and had already adjudicated that they had been seized under an unconstitutional statute. He emphasized that those

facts would distinguish this case from United States v. Calandra, 414 U.S. 338 (1974), even if the principles of that case were otherwise applicable to legislative committees.

Judge Wilkey, on the other hand, argued that as an extension of Calandra, a Congressional employee "commits no new Fourth Amendment wrong by examining and copying documents originally unlawfully seized" (Pet. App. 85a) and he read the safe keeping order of September 14, 1967, as not barring Mr. Brick from taking copies.

There was also disagreement between the two judges on another issue. Judge Leventhal was of the view that, independently of the Fourth Amendment violation, the selection and seizure of documents concededly irrelevant to a legislative inquiry were outside the protection of legislative immunity and could present a justiciable claim of violation of rights of privacy. On the record made in this case up to this point, he concluded that the McSurelys were at least entitled to a trial of their claims. Judge Wilkey disagreed, claiming that Mrs. McSurely's private correspondence was not "concededly irrelevant to legislative inquiry" (Pet. App. 108a), and in his view the privacy claim could not rise to a constitutional tort. He did not consider the matter from the point of view of pendent jurisdiction as referred to in Judge Leventhal's supplemental opinion (Pet. App. 53a).

Judge Danaher's opinion would have dismissed the entire Complaint. There does not appear in his opinion any detailed analysis of the limitations upon the Speech or Debate Clause because he relies on official immunity; moreover, his opinion appears to be based upon a misapprehension of the factual

foundations of the Complaint. 25/

Though Judge Danaher's opinion calls for the dismissal of the Complaint in its entirety, there is some confusion as to whether he and the judges who joined him agreed with that portion of Judge Wilkey's opinion (Pet. App. 54a) expressing accord with Judge Leventhal's statements with respect to "the alleged dissemination of the McSurely documents outside the legislative sphere." Judge Wilkey did say that he was joined in his opinion by Judge Danaher and the other judges who subscribed to the Danaher opinion. 26/

It should be noted that the McSurelys have not filed any cross-petition with respect to those portions of the decision below which dismissed the Complaint or granted summary judgment as to the federal defendants in respect to 1) the original taking of the McSurelys' papers by Kentucky authorities, and 2) the alleged use of the papers within Congress.

25/ Judge Danaher's opinion at no point mentions that the basis of the claims which remain triable under Judge Leventhal's opinion concern the inspecting and taking of private personal correspondence. His analysis of the case assumes that the entire thrust of the Complaint is the issuance of the subpoenas (Pet. App. 119a), which he appears to justify with the statement that "Chairman McClellan and the Subcommittee may well have concluded that the McSurelys would prove to be prime witnesses concerning the economic and social problems prevalent in Kentucky" (Pet. App. 124a).

26/ The government's brief acknowledges this confusion (Gb14, n. 15).

The Court will quickly observe that the government's brief before this Court does not support Judge Danaher's opinion except as it suggests (Gb49, n. 37) the possibility of remand if the government does not succeed on Speech or Debate grounds. Since the government does not discuss the issue, we will not do so either. We submit that in any event the principles which we develop in connection with the Speech or Debate Clause would be equally applicable to a legislative claim of official immunity.

Except for a minor reference in a footnote (Gb31, n. 22), the government does not appear to be supporting Judge Wilkey's main contention that no Fourth Amendment or privacy rights of the McSurelys' were violated.

The thrust of the government's brief is that the absolute immunity of the Speech or Debate Clause encompasses all the acts charged to the federal defendants and if the Court does not accept that contention, then it is claimed that each of the defendants is sought to be implicated only vicariously, which, it is argued, is impermissible under the Speech or Debate Clause.

In this brief we shall respond both to the arguments presented by Judge Wilkey (Point III) and those presented by the government in its brief.

SUMMARY OF ARGUMENT

I.

The government's argument essentially is that all conduct by a Member of Congress or a Congressional aide performed in the course of information-gathering activity is absolutely immune under the Speech or Debate Clause, regardless of violations of the Constitution, as long as it may be said that the conduct is related to a legitimate legislative investigation. This argument was rejected by all 10 judges below. On its face, the government's position is untenable because information gathering may, in addition to search and seizure, include a wide range of activities, including assaults, electronic surveillance, bribery, and other activites which plainly cannot be immunized. The flaw in the government's argument is its failure to recognize the fundamental distinction that this Court has consistently drawn between conduct which merely relates to the legislative process, which is not immunized, and conduct which is an integral part of the legislative process, which is immunized. Further, the government fails to note that the Speech or Debate Clause is operative in respect to speech and speech-type conduct; it is not operative in respect to physical action.

a) The Speech or Debate Clause emerged out of the struggle for Parliamentary independence in England and became part of the Constitution of the United States to assure the Separation of Powers and legislative independence. In English experience, though the Speech or Debate Clause performed its function of protecting Parliamentary independence, there was at the same time a long record

of abuse of the legislative privilege, which was not resolved until the English courts placed restrictions on legislative claims of privilege. In this country there has been, from the beginning, an awareness of the history of abuse of the privilege in England. Perversion of the Speech or Debate Clause has been avoided by the adoption of sharply delineated limitations so that the privilege would be applied to conduct which is "an integral part of the deliberative and communicative process" and would not be applied to conduct which merely "relates" to the legislative process. The fact that conduct is such that legislators normally engage therein does not immunize it under the Speech or Debate Clause. Conduct which is immunized includes voting, speaking on the floor or in committees, filing reports, issuing subpoenas - conduct which is at the heart of the legislative process. Contact with government agencies, assistance to constituents, and preparation for hearings are not legislative acts.

b) The delineation above set forth has been applied by this Court in a number of cases in which immunity has been asserted in respect to investigative activities of legislators. The Court in such cases has differentiated between the use of a subpoena, which is a legislative act, Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), and pre-subpoena information gathering, which is not a legislative act and not entitled to Speech or Debate immunity, Dombrowski v. Eastland, 387 U.S. 82 (1967).

c) In addition to the foregoing distinction, it is clear that the Speech or Debate Clause applies only to speech and speech-type conduct, such as voting. It does not apply to physical acts, such as assaults, arrests, searches and seizures. Except

under very closely limited circumstances involving the direct exercise of its contempt power or the disciplining of its own Members, it is not the business of legislators to arrest members of the citizenry or effect searches and seizures. They are simply not legislative acts.

In view of the vast expansion of the legislative establishment, the claim of the government in this case that legislators and members of their staffs are entitled to legislative immunity whenever they claim to be engaging in preliminary investigative activity on a matter as to which legislation could be had, would place a large number of people above the law. Indeed, the number of people for whom the privilege is being claimed is so large and the claim of privilege is so broad that the abuses of the privilege in England would pale by comparison to that which would follow here if the government's view were adopted.

This Court has recently rejected exaggerated claims of immunity made on behalf of the executive branch of the government, even though the claims were couched in terms of the needs of national security and were made only on behalf of the chief executive. It should similarly reject the broad and extreme claims of legislative privilege asserted here.

II.

The conduct sought to be immunized in this case does not even relate to the legislative process. On the record here, there is an admission that the taking of some of the private papers was not done for any legislative purpose. Under those circumstances, even if it were otherwise possible to consider some information-gathering activities

immune, certainly such activites, when they were admittedly not done for legislative purposes, would be outside the protection of the Speech or Debate Clause.

III.

a) The conduct of defendants as alleged in the pleadings amounted to a violation of the Fourth Amendment rights of the McSurelys. The fact that their papers were first illegally seized by state authorities does not mean that a subsequent taking of them by federal legislators and their staffs may not constitute a Fourth Amendment violation. Cases dealing with the non-application of the exclusionary rule in such circumstances are not instructive on the question whether any of the parties is liable in a damage action. The record here establishes active pursuit by the legislator and his employees of the previously-seized papers and in that situation a Fourth Amendment violation exists even if it were true that a mere passive receipt of previously-seized papers would not establish such liability.

Moreover, the materials were taken by the legislator and his employees and retained by them in the teeth of a federal court order of September 14, 1967, that, pending appeal, the papers be maintained in safe keeping by the state officials. The federal court when it made the safe keeping order had already determined that the statute under which the papers had been seized was unconstitutional and its order had been in response to litigation commenced by the McSurelys to obtain the return of their papers from those who had seized them unlawfully. Under the foregoing circumstances, a

taking of the papers by legislative employees from the safe-keeper must be viewed as an independent violation of the Fourth Amendment rights of the McSurelys.

b) Even if the Court were to hold that the conduct in this case did not violate the McSurelys' Fourth Amendment rights, their right to privacy was certainly violated by intrusion into their private affairs and by the taking of copies of their intimate and personal papers. Unlike Paul v. Davis, 424 U.S. 693 (1976), the denial of the right to privacy rises to the level of constitutional tort because the McSurely's property - copies of their intimate papers - was taken. If not, then the McSurelys on principles of pendent jurisdiction have a right to proceed upon a non-constitutional claim of violation of privacy rights.

IV.

a) Contrary to the arguments of the government, the Speech or Debate Clause does not create a general principle that legislators may not be held liable for the conduct of others. Immunity for the acts of agents of a legislator exists only when the directive act of the legislator is a legislative act, such as voting for a resolution, which is immunized by the Speech or Debate Clause. If the directive act is non-legislative in nature, as it was here, i.e., directing a pre-subpoena unlawful taking of copies of papers, then there is no principle which immunizes a legislator because he acted vicariously.

b) In any event, on the record in this case, the conduct for which liability is claimed against defendants McClellan, Adlerman and

O'Donnell is charged to them directly and not vicariously.

c) The government's contention that violation of the safe keeping order of September 14, 1967, may not be the basis for a claim against the defendant Brick is bottomed upon an incorrect view that the order was not binding on Brick. Even if it were true that the order was binding only on Ratliff, Brick would be vicariously liable and, as stated above, there is no rule that prevents vicarious responsibility of legislators and their staffs for conduct which does not constitute a legislative act. The pre-subpoena taking of the McSurely papers was not such an act.

The Speech or Debate Clause created no immunity for Brick to employ non-legislative acts to obtain irrelevant material on some theory that ultimately relevant material might turn up. The test of immunity is whether the conduct constitutes a legislative act. If it does not, there is no immunity - whether the conduct produced relevant or irrelevant material.

V.

None of the defendants is entitled to summary judgment. None of them has moved for summary judgment on the ground of absence of any genuine issue as to any material fact. The record indeed would not support such a motion. The government's claim in essence is that some of the defendants are entitled to summary judgment because the McSurelys have not in affidavits set forth the detailed basis of the proofs they would offer at trial. On this record, however, those defendants did not present affidavits which disputed well pleaded allegations in the Complaint and, under the

circumstances, the McSurelys were not called upon to furnish the detailed basis of their proofs. The government can find no support for its claim in Dombrowski v. Eastland, supra, because there, unlike here, the defendants did present extremely detailed affidavits disputing the allegations in the complaint.

VI.

The Court of Appeals properly ruled that upon remand the District Court should consider allegations with respect to the possible distribution of McSurely materials to the Internal Revenue Service. Contrary to the assertions of the government, the Amended Complaint encompasses claims as to such distribution. The Speech or Debate Clause provides no immunity for the dissemination of materials outside the halls of Congress. If there is any other kind of privilege of legislative officials to distribute material to an administrative agency, that would not include material illegally obtained. In any event, such a privilege would be a qualified one, subject to a trial to determine questions such as authority, relevance, etc. The Court of Appeals' remand, which included factual and legal questions, was proper.

ARGUMENT

I.

THE SPEECH OR DEBATE CLAUSE DOES NOT PROVIDE IMMUNITY FOR WRONGFUL OR UNLAWFUL CONDUCT BY LEGISLATORS AND THEIR AIDES WHERE SUCH CONDUCT MERELY "RELATES" TO LEGISLATIVE ACTIVITY AND IS NOT AN "INTEGRAL PART OF THE LEGISLATIVE PROCESS," NOR DOES IT PROVIDE IMMUNITY FOR DIRECT PHYSICAL ACTION WHICH INVADES THE RIGHTS OF THE CITIZEN. THE CONDUCT CHARGED TO THE FEDERAL DEFENDANTS HAS NO LEGISLATIVE IMMUNITY.

The government has postulated as its first position that the Speech or Debate Clause bars a suit against a Senator or his aides which charges unlawful conduct in the performance of information-gathering activity - as distinguished from the use of a subpoena - even if such activity would otherwise violate constitutional rights, as long as it may be said that the activity is related to a legitimate legislative investigation.

This position is developed in the following syllogism:

a) "Preliminary investigation leading to the issuance of a subpoena is part of the legislative process" (Heading, Gb20);

b) "The Speech or Debate Clause forbids further inquiry once a court determines that a Member of Congress or an aide was acting within the

scope of legitimate legislative activity" (Heading, Gb22) and that immunity obtains "even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes" (Gb23).

Q. E. D.: Information-gathering activity, even if it involves violations of the Fourth Amendment, is included within the immunity of the Speech or Debate Clause.

It might be well to point out that the government's position presented in its brief before this Court was rejected by all 10 judges below. None of them accepted the thesis that violations of the Fourth Amendment committed in the course of a search or seizure which was part of information-gathering activity, was immunized by the Speech or Debate Clause (see Judge Leventhal's opinion, Pet. App. 20a; Judge Wilkey's opinion, Pet. App. 55a, n. 3).

The implications of the government's position are not spelled out in its brief. But it is readily apparent that it involves an acceptance of lawlessness and violation of the Constitution which are wholly at odds with our system of government and well-defined limitations on the Speech or Debate Clause. After all, information-gathering activity can include almost any kind of conduct: search, seizure, electronic surveillance, assault, blackmail, theft of documents, bribery, extraction of a confession by torture, false imprisonment, sexual seduction, breaking into a psychiatrist's office, robbery, and every conceivable technique - fair or unfair, lawful or unlawful - that investigators use.

It would be strange indeed if such a range of activities were beyond the reach of the law, but that would clearly be so under the government's

argument.

The main flaw in the government's syllogism is that its premises ignore the firm rule which distinguishes conduct which merely relates to the legislative process from speech or similar conduct which is an integral part of the legislative process. This distinction has been articulated in every case which has dealt with the Speech or Debate Clause. This distinction has made it possible for the Speech or Debate Clause to perform its function as a protector of legislative independence, while at the same time preventing the development in this country of the abuses that prevailed in England for several centuries when legislators considered themselves super-citizens, outside the rule of law, and when weak courts felt unable to protect citizens subjected to abuses by legislators. Applying this distinction to investigative activities of Congress, there is a clear and sharp difference between the issuance of a subpoena and the general run of activity which may precede the issuance of a formal legislative command. 27/

An additional flaw in the government's argument is its failure to recognize the difference between speech and speech-type conduct, such as voting and writing committee reports, and direct physical action such as the taking of documents.

27/ Part of the government's argument is that "an immunity that would protect only when no wrong was alleged to have been committed would be no immunity at all" (Gb25). The government thus confuses the question whether the immunity is applicable to a particular type of conduct with the question of the extent of immunity.

A.

The historical background of the Speech or Debate Clause.

The Speech or Debate Clause has its "taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries," Tenney v. Brandhove, 341 U.S. 367, 372 (1951). The Framers of our Constitution knew very well that the Speech or Debate Clause had been "born primarily of a desire ... to prevent intimidation by an executive and accountability before a possibly hostile judiciary," United States v. Johnson, 383 U.S. 169, 181 (1966). They also knew that English constitutional history at times witnessed gross misuse of the Parliamentary privilege, as noted by Professor Wittke: 28/

> "Privilege played an important role in the great political struggles of the past centuries. At times claims of privilege were used to champion the cause of the people; there were also times when privilege became the greatest oppressor of the subject's liberty. Parliamentary privilege has frequently served as a bulwark of liberty and individual freedom, but on the other hand, in the hands of crafty, powerful and designing politicians eager to perpetuate their control and to gain the utmost personal advantage, privilege has been used as a screen for the basest oppression. There were times when privilege was used to give legal color to a Parliamentary Despotism as

28/ Wittke, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE (Ohio State Univ. Studies, 1921). Professor Wittke's study has been authoritatively referred to by this Court, United States v. Johnson, supra, 383 U.S. at 178.

> oppressive of individual liberty as many Kings with their claims of prerogative have been." Wittke, at 15.

For many years, injured subjects had no redress against an indiscriminate extension of parliamentary immunities. The ordinary courts of the Kingdom were considered "inferior to the High Court of Parliament and could not pass judgment on its claims of privilege." 29/ With the extension

29/ Wittke, supra, at 199. Professor Wittke cites many examples of the "Parliamentary tyranny" which resulted from unchecked extension of the parliamentary privilege. For example, in 1675, in the case of Shirley v. Fagg, 9 Com. J. 354, 6 How. St. Tr. 1162, Wittke points out that the Commons "boldly claimed for the law and custom of Parliament a power transcending the sacred guarantees of Magna Carta and the Petition of Right." Wittke, at 95. See, also, The Case of the Earl of Shaftesbury, 1 Modern Repts. 144 et seq. The famous cases of John Wilkes and the Middlesex Election, see May's CONSTITUTIONAL HISTORY OF ENGLAND, Chaps. IX, X, XI, became, in the words of Professor Wittke, "eventually a contest between the electors of England and the Crown - the latter acting through a controlled and bought House of Commons." And Wittke concludes "under the guise of privilege, the Parliament houses infringed more and more upon the fundamental rights of the electorate of England." Wittke, at 118. The cases involving Wilkes, such as Entick v. Carrington, 19 How. St. Tr. 1154, are well known for their historic contributions to the preservation of personal liberty. But in addition, as Wittke points out, the long struggles of Wilkes demonstrated

[Footnote continued on next page.]

of the parliamentary immunities to members' servants, "the abuse of privilege became intolerable," Wittke, at 200. By the eighteenth century "a corrupt, time-serving Parliament had learned to use the law of privilege to punish personal enemies ... privilege became a real danger to individual liberty ... the common law guarantees of the subject's rights and liberties proved of no effect when matched with a Parliament, determined to vindicate its claim of privilege." Wittke, at 201.

The ultimate resolution of this conflict in England took many years. Not until Stockdale v. Hansard, 9 AD. & E. 1 (1837-1842), was it finally resolved that the legitimate scope of the legislative privilege of immunity must be tested by whether the act sought to be immunized "is indispensably necessary for the performance of the duty they are employed in, and also that it has been uniformly allowed," 9 AD. & E. at 240. Or, as Justice Coleridge placed it, the privilege of legislative immunity is permitted only where required "for the effective discharge of those duties which by the Constitution are cast upon the House of Commons," id. at 218.

Furthermore, no legislative immunity attaches to a "known and undoubted breach of the law," for

[Footnote continued from previous page:] dramatically "how easily a claim of privilege might be used to sanction the arbitrary proceedings of ministers and Parliament, even when a fundamental right of the subject was concerned." Wittke, at 127. See also, Alexander Murray's Case, 1 Wils. 299; Regina v. Paty, 2 Ld. Raym. 1105; Case of Captain Streater, 5 How. St. Tr. 336; Sir Robert Pyle's Case, 5 How. St. Tr. 948.

neither "House of Parliament can authorize any person to commit with impunity a known and undoubted breach of the law," id. at 188.

In this country, the conflicting pulls for legislative immunity on the one hand and the need to protect the citizenry from abuse were far more easily resolved than in England; firstly, because principles of judicial supremacy early became part of the bedrock of our system, and secondly, because the Framers of our Constitution were fully aware of the abuses which had occurred in England as a result of the absence of sharply defined boundaries for the privilege, and made it clear from the outset that no such abuses would be permitted in this country.

Early on, Thomas Jefferson articulated the parameters of the privilege:

> "For any speech or debate in either house they [legislators] shall not be questioned in any other place...; but this is restrained to things done in the house in a parliamentary course... for he is not to have privilege contra morem parliamentarium, to exceed the bounds and limits of his place and duty." Jefferson, MANUAL OF PARLIAMENTARY PRACTICE III, "Privilege."

And in the first case which arose in this land interpreting the Speech or Debate Clause, it was made clear that the scope of the privilege was to be "the judgment of the court," Coffin v. Coffin, 4 Mass. 1, 32 (1808), and, additionally, that:

> "The privileges are thus secured, not with the intention of protecting the members against prosecution for their own benefit, but to support the rights of the people." Id. at 27.

Thus, in the United States, rooted in principles

of egalitarianism, the Speech or Debate Clause, from the beginning, has been viewed functionally in terms of what was truly necessary to protect the operations of the legislature, rather than from the point of view of establishing another group - legislators - who could claim "privileges," in those times so much a part of the English legal structure.

B.

Conduct which is "an integral part of the deliberative and communicative process," as distinguished from that which merely "relates" to the legislative process.

In this Court the Speech or Debate Clause has in its functional sense always been read "broadly to effectuate its purpose," Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501 (1975), and though the Clause

> "speaks only of 'Speech or Debate,' ... the Court's consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view... Rather than giving the clause a cramped construction, the Court has sought to implement its fundamental purpose of freeing the legislator from the executive and judicial oversight that realistically threatens to control his conduct as a legislator." Gravel v. United States, 408 U.S. 606, 617-18 (1972).

Accordingly, in addition to actual speech or debate on the floor of Congress (as in United States v. Johnson, supra), the Clause also encompasses voting (United States v. Brewster, 408 U.S. 501 [1972]), resolutions adopted by the body (Kilbourn v. Thompson, 103 U.S. 168 [1881]), committee

hearings (Gravel, supra), and publication for the use of the body of its reports (Doe v. McMillan, 412 U.S. 306 [1973]).

In this manner, the Court has delineated the parameters of the Speech or Debate Clause as including matters "generally done in a session of the House by one of its Members in relation to the business before it," Kilbourn, supra, at 204, underscoring supplied; which includes "written reports presented in that body by one of its committees ... resolutions offered ... the act of voting, whether it is done vocally or by passing between tellers," ibid.

But while the Court has gone beyond the words "speech or debate," it has consistently rejected efforts to extend the Speech or Debate Clause to conduct which is not at the core of legislative activity and which merely relates to the legislative process, even though activities at issue are customarily performed by legislators.

The government's contention in the instant case that the Clause should be so extended is exactly the argument presented by Senator Brewster, who urged "that the Clause protected from executive or judicial inquiry all conduct 'related to the due functioning of the legislative process,'" United States v. Brewster, supra, 408 U.S. at 513. Rejecting that argument, the Court said:

> "In no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process." Id. at 515, emphasis in original.
>
> The Court said further:
>
> "The sweeping claims of appellee would render Members of Congress virtually immune from a wide range of crimes simply because the acts in question were peripherally related to

their holding office." Id. at 520.

The essential distinction drawn by the Court is between conduct characterized as merely "relating to the legislative process," Brewster, supra, 408 U.S. at 515, and conduct which is an "integral part of the deliberative and communicative process," Gravel, supra, 408 U.S. at 625. The decisions of the Court "reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings," id. at 620. The test is definitely not whether the act for which immunity is claimed is one actually done by a legislator, even in his capacity as such. "That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature," id. at 625.

In short, there is a difference between a Senator's making a speech on the floor of the Senate, introducing a bill, voting for a bill, or participating in the issuance of a committee report, and his engaging in the myriad of activities which every Member of Congress undertakes but which are not at the heart of the legislative process. Brewster, supra, 408 U.S. at 516. Such activities may be dealing with the Department of Justice (Johnson, supra, 383 U.S. at 751); they may involve reviewing material antecedent to a hearing (Gravel, supra, 408 U.S. at 628); or the republication of information subsequent to the legislative act (id. at 622, 625; Doe v. McMillan, supra, 412 U.S. at 315), none of which has speech or debate immunity.

Focusing more directly on the issue in the instant case, the Court has in a number of cases dealt with the impact of the Speech or Debate Clause on various forms of the exercise of investigatory or preparatory activity by Congress. The line which this Court has drawn - distinguishing legislative acts which receive immunity from others which are not immunized - is clearly defined. In essence, a subpoena, which is a formal exercise of legislative authority commanding appearance, testimony and possibly the production of papers, is a legislative act, Eastland v. Servicemen's Fund, supra, 421 U.S. at 507; "gathering information for a hearing" is definitely not a legislative act, Gravel, supra, 408 U.S. at 620.

In Servicemen's Fund, the Court dealt with a subpoena and the question whether there was judicial power to enjoin its use. It was clear that if the issue had been presented in terms of the exercise of judicial power to punish refusal to comply with the subpoena, constitutional restrictions would be applied by the courts, 421 U.S. at 509, n. 16.

The question was whether there was independent judicial power affirmatively to interfere with issuance of the subpoena. Since the subpoena is a formal exercise by Congress of its legislative power, the Court, on Speech or Debate considerations and the Separation of Powers doctrine, concluded that the judicial branch had no jurisdiction to act in the matter excepting to the extent of determining whether the subpoena had in fact been authorized by Congress. 30/

30/ "Although the power to investigate is necessarily broad, it is not unlimited. Its boundaries

[Footnote continued on next page.]

But in cases not involving issuance of a subpoena the Court has specifically stated that Members of Congress would not be "immune" if "in order to secure information for a hearing [they] themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides would be immune from liability or questioning in such circumstances. Such acts are no more essential to legislating than the conduct held unprotected in United States v. Johnson, 383 U.S. 169 (1966)." Gravel, supra, at 621.

And that was indeed the precise holding in Dombrowski v. Eastland, 387 U.S. 82 (1967), where the Court, despite the claim of the Speech or Debate Clause, remanded for trial a charge that a Senate employee had engaged in a raid which violated Fourth Amendment rights. 31/

[Footnote continued from previous page:]
are defined by its source." Servicemen's Fund, supra, 421 U.S. at 504. And the question of legislative jurisdiction remained open for judicial determination because "Congress is not invested with a general power to inquire into private affairs." Ibid.

31/ The government's effort to distinguish Dombrowski as having involved a raid to gain evidence for use in a state prosecution, as contrasted with the carrying out of what was an otherwise legitimate function (Gb28-9), finds no support in any of the pleadings or briefs submitted by either side in the Dombrowski case. In fact, the pleadings charged a conspiracy to violate constitutional rights by effecting a seizure and thereafter by the Senate

[Footnote continued on next page.]

The government's entire argument in this case is based upon an effort to extend to non-subpoena investigative activity the kind of immunity that the Court applied in Servicemen's Fund to a formal exercise of legislative power through a subpoena.

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committee's taking over the papers, with no suggestion that the object of the seizure was to gain evidence for a state trial. The government's brief in Dombrowski strongly contended that the conduct of Mr. Sourwine, chief counsel to the Senate committee, was "within the scope of his duties as an employee and agent of the Senate [and] is protected by the Speech or Debate Clause" (government brief in Dombrowski v. Eastland, #118, October Term, 1966, p. 36) and the government emphasized that Mr. Sourwine was acting for Senator Eastland and the subcommittee and that the subcommittee was conducting an investigation within the sphere of the legitimate legislative functions of the Senate subcommittee (ibid.). There is not a hint in prior papers of a contention that Mr. Sourwine's alleged conduct related to a state prosecution. Indeed, contrary to the government's explanation of Dombrowski, the Court in Gravel analyzed Dombrowski as a case where "the committee counsel was gathering information for a hearing," 408 U.S. at 628, and stated the holding to be that the immunity clause would not extend to "conspiracy with state officials to carry out an illegal seizure of records that the committee sought for its own proceeding," id. at 619; underscoring supplied.

The effort to mask this fundamental distinction appears in the government's treatment of Dombrowski. Twice in the course of its brief (Gb28; Gb38, n. 25) the government distorts Dombrowski, claiming that it approved the "takeover" of papers from state officials who may have illegally seized the same. While there is some doubt whether this Court addressed that question, 32/ the point which the government conveniently ignores is that in Dombrowski the "takeover" was done after the issuance of a subpoena. There were indeed issues in that case as to the authority of the chairman to issue the subpoena and whether a subsequent act of ratification could be effective if there had not been authority, but there was never any doubt in Dombrowski but that it was formal legislative power through a subpoena which had been exercised and the lower court was satisfied that at least for purposes of immunity the subsequent ratification was entirely adequate (see Pet. App. 7a, Dombrowski v. Eastland, #118, October Term, 1966).

Directly within Dombrowski then is the distinction between the use of a subpoena and non-subpoena information-gathering activity. The "takeover" or receipt of documents pursuant to a subpoena was considered beyond judicial power under the Speech or Debate Clause. The engaging in information-gathering activity which included a pre-subpoena raid was outside the protection of the Speech or Debate Clause and was held very

32/ That question was dealt with in the Court of Appeals decision and only inferentially dealt with by this Court in that the lower court decision was affirmed on that issue.

definitely to be subject to judicial remedy by way of a damage action.

So, too, in the Servicemen's Fund opinion the Court emphasized the distinction between a subpoena and preliminary investigative activity, as appears from the following:

> "Respondents rely on language in Gravel v. United States, supra, at 621,
>
> > '[N]o prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances.'
>
> From this respondents argue that the subpoena works an invasion of their privacy, and thus cannot be immune from judicial questioning. The conclusion is unwarranted. The quoted language from Gravel referred to actions which were not 'essential to legislating.' Ibid. See United States v. Johnson, 383 U.S. 169 (1966). For example, the arrest by the Sergeant at Arms was held unprotected in Kilbourn v. Thompson, supra, because it was not 'essential to legislating.' See Marshall v. Gordon, 243 U.S. 521 (1917). Quite the contrary is the case with a routine subpoena intended to gather information about a subject on which legislation may be had." 421 U.S., supra, at 507-8; emphasis in original.

Gravel is particularly significant as demonstrating this Court's refusal to immunize unlawful

"information gathering" activities. There the Court, sua sponte and though certiorari was not even sought upon the issue by the government, refused to extend the Speech or Debate Clause so as to bar inquiry into the sources of information utilized in preparation for legislative acts. 33/ Cf., Mr. Justice Stewart, dissenting in part, id. at 629.

The government's effort to ignore the distinction between a subpoena and information-gathering activity without benefit of an official writ overlooks the teachings of this Court in the cases by which it has established definite parameters about the Speech or Debate Clause. If there is any threshold which distinguishes conduct which merely "relates" to the legislative process from conduct which is an "integral part" of that process, surely it must fall

33/ The Court's sharp distinction between information gathering and legislative acts appears in the following:

> "Neither do we perceive any constitutional or other privilege that shields Rodberg, any more than any other witness, from grand jury questions relevant to tracing the source of obviously highly classified documents that came into the Senator's possession and are the basic subject matter of inquiry in this case, as long as no legislative act is implicated by the questions." Gravel, supra, 408 U.S. at 628.

In making this ruling the Court rejected a concession by the Solicitor General made during oral argument that a Senator could not be questioned about the acquisition of material. Id. at 632-33, n. 4.

between a subpoena and preliminary investigative activity.

A subpoena is a formal exercise of the compulsory process in an investigation. It is a well-defined, observable exercise of power, generally requiring specific authority by a Senator or Member of Congress, cf., Wheeldin v. Wheeler, 373 U.S. 647 (1963). A subpoena's regularity and scope can be, and often are, subjected to judicial scrutiny if an effort is made to enforce it against a recalcitrant witness. See discussion in Servicemen's Fund, supra, 421 U.S. at 509, n. 16. A subpoena does not involve the exercise of force. It is a command, not a warrant, and neither the issuer nor the person serving the subpoena is given the authority thereby to arrest or by force seize persons or papers, cf., Wheeldin v. Wheeler, supra.

By contrast, as pointed out above, investigative activity can be literally anything - and may involve the direct application of force, which is hardly the business of the legislature.

At the heart of the American constitutional system are the Fourth and Fifth Amendments, both representing fundamental controls over the investigatory process of all branches of the government, including the legislature. There is no doubt that the right to search and seize papers without the limitations of the Fourth Amendment would be a useful and powerful tool in the hands of any investigator. So, too, would the right to torture, which acknowledgedly is a most effective investigatory tool. These techniques of "preliminary investigation" or "information gathering" would indeed produce results; at what price is another matter. The government argues that as long as a legislative purpose may be asserted or even established, these constitutional protections evaporate - whether they be

under the First or Fourth Amendment (and, we assume, the Fifth Amendment as well). This argument effectively says that there is nothing to prevent Congressional investigators from engaging in the most brutal form of investigative activity if they but assert a legislative purpose.

That is simply not the law. It flies in the face of all decisions of this Court which have dealt with preliminary investigative activity (Dombrowski, Gravel, and Servicemen's Fund, all supra) and also literally every decision of this Court which has involved the Speech or Debate Clause, out of which there has emerged the sharp distinction between conduct which merely relates to the legislative process and conduct which is an integral part of the deliberative and communicative process.

C.

The Speech or Debate Clause does not extend to direct physical action by legislators or their aides.

We submit that no pre-subpoena "information gathering activity" is encompassed within the Speech or Debate Clause. We suggest, however, that even if the Court were of the view that under certain circumstances some such activity could be so covered, it would certainly not include direct physical actions, as distinguished from words or word-like conduct such as voting.

Particularly appropriate to this point is an incisive question put by Chief Justice Theophilus Parsons in Coffin v. Coffin, supra, in the midst of oral argument:

> "Chief Justice. Would you extend the privilege to actions as well as words? Suppose, for instance, one member should assault or beat another in the presence of the house; would he

> not be answerable in an action, or on an indictment, in a court of law?
>
> Bidwell. Unquestionably he would. For it is the freedom of deliberation, speech, and debate, only, and not of assaulting and beating, that is secured by the constitution. For other personal injuries and abuses, a member may be answerable or indictable; but not for any abuse of the freedom of deliberation, speech, and debate, in the house." 4 Mass. at 11-12.

This distinction between action on the one hand and speech and speech-type conduct on the other is more recently developed in Gravel, where the Court analyzed some of its earlier decisions.

In referring to Kilbourn, supra, the Court noted that there would indeed be absolute immunity in so far as concerned the adoption of a resolution directing an arrest; "that act was clearly legislative in nature." But the arrest itself was not a legislative act and thus "[t]he Speech or Debate Clause could not be construed to immunize an illegal arrest even though directed by an immune legislative act." Gravel, 408 U.S. at 619.

In referring to Powell v. McCormack, 395 U.S. 486 (1969), the Court pointed out that the Members of Congress were immune because they had done nothing but vote for a resolution, but that employees of Congress would be subject to suit for the physical act of barring a Member from his seat, 408 U.S. at 620.

In referring to Dombrowski, it pointed out that committee counsel was charged with "conspiring with state officials to carry out an illegal seizure of records that the committee sought for its own proceedings ... unlawful conduct ... [which] the Speech or Debate Clause simply did not immunize," 408 U.S. at 619.

The exercise of the actual force of government which is involved in either an arrest or search and seizure is not the business of legislators; they may speak, hold hearings, publish reports, vote, enact laws, and by subpoena even command testimony or production of papers. They have the limited power to hold persons in contempt for refusal to testify, Marshall v. Gordon, supra, 243 U.S. 521 (1917), provided they are acting within their jurisdiction, Kilbourn v. Thompson, supra; they have the power specifically granted by the Constitution to punish and imprison their own Members for "disorderly conduct," Kilbourn, supra, 103 U.S. at 189-90. But the legislature does not have the general power to employ force against a citizen - by arrest, physical punishment, or search and seizure. Those powers were never lodged within our legislature which, unlike Parliament in England, has never been considered a court. Cf., Kilbourn, id. at 183.

It is thus clear that, quite aside from the fact that the conduct here was without writ and therefore outside the parameters of the Speech or Debate Clause, it would have been outside the business of the legislative body even if there had been a writ. The legislature does not have the power to issue a writ of attachment or warrant to seize property, nor a fortiori may it seize property without a warrant. Seizure of property with or without a a warrant is the business of the executive branch of the government, subject, under the Constitution, to controls by the judiciary.

The facts of this case mirror the kinds of abuses which grew out of an unrestrained exercise of Parliamentary privilege in English history. But were the government's pos ition here to be adopted, the quantitative impact of such a decision

would make the English experience pale by comparison. In the light of Gravel, supra, 408 U.S. at 618, Congressional staff members are given the same immunity that is afforded to Members of the legislature. Inspection of the Congressional Directory for 1977 reveals that there are 15 standing committees of the Senate and 22 of the House; there are 11 select and special committees of the Senate and 10 of the House; there are seven joint committees. These committees have a total of 1933 staff members. 34/ Inquiry of the offices of the clerks

34/ The breakdown of staff members for each committee, as appears in the Congressional Directory, is as follows:
Senate Standing Committees: Agriculture (27), Appropriations (69), Armed Services (28), Banking (39), Budget (66), Commerce (90), Energy (18), Environment (44), Finance (36), Foreign Relations (60), Governmental Affairs (37), Human Resources (37), Judiciary (11), Republican Conference (14); House Standing Committees: Agriculture (53), Appropriations (73), Armed Services (37), Banking (3), Budget (62), District of Columbia (44), Education & Labor (48), Government Operations (50), Interior (55), International Relations (69), Interstate & Foreign Commerce (136), Judiciary (75), Merchant Marine (32), Post Office (12), Public Works (92), Science (57), Small Business (4), Standards of Official Conduct (9), Veterans (29), Ways & Means (79); Senate Select & Special Committees: Aging (14), Democratic Senatorial Campaign (3), Ethics (1), Intelligence (17), National Republican Senatorial (4), Nutrition (15), Republican Policy (12), Small Business (15); House Select & Special Committees: Aging (25), Assassinations (23), Democratic National Congressional (5),
[Footnote continued on next page.]

of the Senate and the House indicates there are approximately 7,000 staff employees of Members (each is allowed a maximum of 18) and approximately 3,000 in the Senate (Senators' staffs range from five to 40). Upon the government's argument, each of these 12,000 persons, in addition to the 535 Senators and Representatives, would be entitled to immunity against any claim that constitutional rights had been violated, so long as they claim that their activities were investigative and related to a matter on which legislation could be had.

As we pointed out above, this Court rejected exaggerated claims of immunity and super-citizenship made on behalf of the executive branch of the government, United States v. United States District Court and United States v. Nixon, both supra, even though the claims were couched in terms of the needs of national security and were made only on behalf of the chief executive. It would be wholly inconceivable that broad, undefined and unlimited claims of immunity would be recognized as being vested in an army of legislative employees with power to repeat the kind of outrage which was visited upon the McSurelys.

The boundaries of the Speech or Debate Clause have heretofore been precisely delineated because

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[Footnote continued from previous page:] Democratic Steering (7), Ethics (5), Narcotics (10), National Republican Congressional (2), Outer Continental Shelf (12), Republican Policy (1); Joint Committees: Atomic Energy (19), Congressional Operations (12), Defense Production (7), Economic (46), The Library (2), Printing (27), Taxation (54). Summary: 58 committees, 1933 staff members.

the Court is fully aware that the Clause places certain persons above the law. Granted that sound historical reasons call for this privilege, early as well as recent history requires that any such exceptions from the "rule of law" remain closely circumscribed.

II.

THE CONDUCT OF THE DEFENDANTS HERE DOES NOT EVEN "RELATE" TO LEGITIMATE LEGISLATIVE ACTIVITY.

We have argued above that the Speech or Debate Clause does not provide immunity for conduct which merely relates to what otherwise might be a legitimate legislative investigation and does not involve the use of the formal legislative device of a subpoena. But the unique facts of this case take it outside of even the penumbra of arguable relationship. As stated by Judge Leventhal,

> "This case is unusual because Brick in testimony at the McSurelys' contempt trial conceded that when 'he went to Pikeville to examine the documents in the Court House,' he looked through the papers and books and determined there were 'many' items that he 'didn't need at all,' including a letter addressed to plaintiff Margaret McSurely, as 'Dearest Cucumber,' from a prominent newspaper columnist."
> (Pet. App. 34a-35a.)

At that point Judge Leventhal quoted from the testimony of Mr. Brick set forth on p. 13 , supra.

It should be observed that in this case the Complaint specifically alleged a conspiracy to take documents "for the private purposes of the defendant McClellan in order to ... intimidate" the McSurelys and individuals with whom they may have been associated (A. 31) and that what was involved was a use of "the instrumentality of the investigation to carry out a personal vendetta between himself [McClellan] and a certain personage of prominence named in some of the private correspondence of the plaintiff Margaret McSurely" (A. 35).

Even where conduct at issue involves a clear exercise of legislative power, e.g., the issuance of a subpoena, the question of authority for the exercise of power is open for judicial determination. "Although the power to investigate is necessarily broad, it is not unlimited. Its boundaries are defined by its source." Servicemen's Fund, supra, 421 U.S. at 504, n. 15.

A Senator does not by virtue of his office have any power to issue a subpoena. He has that power only to the extent that the Senate by resolution has authorized him, or more likely a committee, to exercise Senatorial subpoena power in respect to a matter duly delegated to theSenator or his committee. We need not be detained by the question whether a court would have the power to prevent the enforcement of a subpoena where a Senator admitted that, though he was using a legislative tool, his objective was strictly personal and wholly non-legislative. It may be, though it is doubtful, that the claimed inviolability of a legislator's motive (Tenney v. Brandhove, 341 U.S. 367, 377 [1951]) would prevail even in such a situation. Surely no such sacrosanct character may be claimed for information-gathering activities. We have demonstrated above that no pre-subpoena investigative actions command immunity. If the Court should disagree and be of the view that some such activity is immunized, surely that immunity would not extend to such activities as were admittedly carried out for non-legislative purposes.

On the face of this record we believe that Judge Leventhal's argument is unassailable:

> "Brick's testimony at the contempt trial ultimately may be explained away to the satisfaction of a jury. But it is plainly sufficient to preclude an automatic dismissal of the

lawsuit at the threshold, on the basis of legislative immunity. 'To hold otherwise would be to invite gratuitous injury to citizens for little if any public purpose.' Doe v. McMillan, 412 U.S. at 316-17." (Pet. App. 38a-39a.)

In this connection we observe the argument appearing on page 42 of the government's brief, n. 30, to the effect that "it is not clear ... that Brick knew at the time that the documents were irrelevant" (emphasis in original). We do not know how such an argument can be made in the face of the specific testimony of Mr. Brick, as follows:

"Q Did you tell Mr. Dotson or any of the folk with whom you met there that there was some of that stuff that you didn't think that you needed?

A Yes.

Q Did you give it back to them?

A No." (A.101)

There is an attenuated argument in the government's brief to the effect that Mr. Brick had a right to take papers even if at the moment he thought them irrelevant so that there could be a subsequent evaluation of their relevance (Gb41). This theoretical formulation has nothing to do with the record in this case, and overlooks the special treatment of the "Dearest Cucumber" letter by Senator McClellan. The Senator "glanced" at that letter (A.100), written by a nationwide columnist who had strongly attacked him (U.S. v. McSurely Trial Tr., 1026-1030A) and then gave Mr. Brick "different instructions on that" (A.100). He directed that it be put under lock and key, not to be inspected by anyone except himself, Mr. Adlerman, or Mr. Brick, thereby keeping it out of the files of the Committee and excluding even his Committee colleagues from an opportunity to

inspect it. There is not the slightest suggestion that during the entire 13-month period when the Senator had this letter in his control there was any consideration of the possible relevance of the "Dearest Cucumber" letter to any legitimate investigation then being conducted by the Committee (Pet. App. 53a). 35/ Nor could there have been any such legislative use of this material. Judge Leventhal correctly pointed out that the material here was so far out of bounds - and there was such a clear concession of a lack of legislative basis therefor - that the court's "selective approach to evaluating Brick's conduct ... is consistent with and compelled by the pertinent Supreme Court decisions interpreting the Speech or Debate Clause," dissenting opinion at time of panel decision (Pet. App. 183a). He continues:

"[O]nce private material was examined by

35/ There is a truly frightening suggestion in Judge Wilkey's opinion that a Senate committee authorized to investigate civil distrubances could legitimately be interested in the relationship between Margaret McSurely and Drew Pearson because "[h]e and what he wrote could be influenced by a woman for whom he had affection" (Pet. App. 108a).

The resolution under which Senator McClellan and his staff were purporting to act had to do with urban riots and their causes, and no one has yet suggested that anything that Drew Pearson wrote or did not write affected whether or not a riot had occurred.

Brick and there was no arguable basis for appraising them as relevant, his further actions in retaining and transporting them were non-legislative." (Pet. App. 184a). 36/

The argument made by the government here tends only to underscore the inappropriateness of a claim of legislative immunity for any "preliminary" legislative activity. Certainly it shows that no such immunity can as a matter of law, and before trial, be established where there is an admission under oath in a court of law that no legislative purpose existed for the acts complained of. 36/ Judge Leventhal offered an analogy which is quite appropriate:

"The improper and non-legislative nature of Brick's conduct is indicated by analogy to the authority granted by a search warrant. Where a warrant is issued that describes particular papers, objects and effects that are germane to the pending inquiry, any further seizure is clearly actionable. Other material may be inspected only for the limited purpose of determining whether it comes within the matters particularly described and authorized for seizure. Brick's examination exceeded the bounds of a threshold 'search' for purposes of determining relevancy. Much like the police officer who in the course of executing a search warrant seizes material which he knows is not authorized by the warrant cannot be deemed to have engaged in a lawful search and seizure, certainly Brick's unauthorized, knowing selection and display of private papers beyond the scope of the subcommittee's inquiry cannot be deemed a legitimate legislative act." (Pet. App. 182a-183a.)

III.

UPON THE PLEADINGS AND ADMITTED FACTS, A MORE THAN "COLORABLE" CLAIM OF VIOLATION OF THE FOURTH AMENDMENT AND PRIVACY RIGHTS OF THE McSURELYS HAS BEEN MADE AGAINST EACH OF THE DEFENDANTS.

It is of course clear that the absence of immunity does not of itself establish liability. At a trial, the McSurelys must establish that some right, constitutional or otherwise, has been violated.

The issue in this case at this time is only whether the McSurelys are entitled to have a trial where they may make such proof. Contrary to the position asserted by Judge Wilkey, the McSurelys contend that their rights under the Fourth Amendment and their right of privacy have been violated. As explained above (supra, p.33), the issue here discussed is developed mostly in Judge Wilkey's opinion and is referred to only limitedly in the government's brief.

If, as we have demonstrated, the acts and conduct complained of are outside the parameters of the Speech or Debate Clause, and if it further appears that such acts and conduct breach important rights of the McSurelys, then the cause of action is sustainable.

A.

The McSurelys' Fourth Amendment rights were violated.

Despite the enormity of the invasion of the McSurelys' rights, Judge Wilkey argues that the federal defendants are nevertheless free of liability because, so he claims, there is no impropriety in the mere receipt of documents illegally seized by third parties.

Fundamental to his argument is the thesis that once the McSurelys had their rights violated by Kentucky officials, even if by a seizure in violation of the Fourth Amendment, any subsequent taking of documents from the Kentucky officials by others is beyond the reach of the law, and this despite the fact that the McSurelys had already gone to court and, subject to a right of appeal, had won the right to the return of their papers. In essence, the argument urges that once one law enforcement official has violated Fourth Amendment rights by an unconstitutional seizure, the hapless citizen-victim is fair game for any other government official who might be involved in a subsequent or secondary taking of the citizen's papers, regardless of any intermediate legal actions which are taken by the victim to halt the invasion of rights.

We submit this argument is based on a plain misreading of some recent Fourth Amendment decisions of this Court. In a word, Judge Wilkey relies on cases which hold that the exclusionary rule is inapplicable in selected situations where items have been unlawfully seized, and seeks to read those cases as if they held that there are no

Fourth Amendment violations in any subsequent or secondary taking of property previously seized.

But the issue of the applicability of the exclusionary rule to the subsequent use of evidence after an earlier seizure is totally different from whether an individual who takes previously illegally-seized documents may be subject to a damage action for violation of Fourth Amendment rights.

In support of his contentions, Judge Wilkey relies most heavily on United States v. Calandra, 414 U.S. 338 (1974), but he also cites United States v. Janis, 428 U.S. 433 (1976), and Burdeau v. McDowell, 256 U.S. 465 (1921). These cases deal only with the exclusionary rule; in no way do they negate a claim for damages; indeed, as we later point out, Calandra in particular supports such claims. The concern of the Court in this series of cases, as stated in Janis, was whether the exclusionary rule was appropriate since it was unlikely to have its supposed deterrent effect. And it is obvious from a reading of Janis that the Court is reassessing the workings of the exclusionary rule in a wide variety of situations. 37/

Significantly, the government does not in its brief press Judge Wilkey's argument, nor does it even cite Calandra. While the government gives no explanation therefor, we believe that it recognizes that Calandra emphasized that an important factor permitting limitations on the exclusionary

37/ Judge Leventhal's opinion at the time the first panel considered this case includes an analysis as to why, despite Calandra, the exclusionary rule might still be applicable to a Congressional use of material after a seizure by state authorities (Pet. App. 187a).

rule is the existence of other available remedies, particularly damage suits, against those responsible for the invasion of constitutional rights. Thus, the Court there said:

> "It should be noted that, even absent the exclusionary rule, a grand jury witness may have other remedies to redress the injury to his privacy and to prevent a further invasion in the future. He may be entitled to maintain a cause of action for damages against the officers who conducted the unlawful search. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). He may also seek return of the illegally seized property, and exclusion of the property and its fruits from being used as evidence against him in a criminal trial. Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931). In these circumstances, we cannot say that such a witness is necessarily left remediless in the face of an unlawful search and seizure." 414 U.S. at 354.

It is clear, then, that cases which deny application of the exclusionary rule may not be read as giving a gloss upon what constitutes a violation of the Fourth Amendment. They deal only with whether in a given situation the criminal (or civil tax defendant) should go free "because the constable has blundered." Cardozo, C.J., in People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

If recent exclusionary rule cases have had any impact at all upon civil suit remedies against the "blundering constable," they have strengthened and buttressed this remedy, rather than undermined it. Considering the conflicting pulls of law enforcement versus the privacy protected by the Constitution, the Court is obviously reconsidering the efficacy

and desirability of the judge-made exclusionary rule in certain circumstances. Far from suggesting a comparable diminution of the civil remedy, the Calandra opinion shows that the Court views the existence of the civil remedy as one of the considerations which permits the curbing of the exclusionary rule as the corrective device for violation of rights by law enforcement officers.

We do not undertake a debate as to the relative efficacies of the exclusionary rule and the civil damage action as a means of controlling violations of the Fourth Amendment by law enforcement officials. Cf., Amsterdam, "Perspectives on the Fourth Amendment," 58 Minn. L. Rev. 349, 429 (1974). Our point is simply that one cannot have it both ways. One cannot argue that the exclusionary rule is ineffective, and also unnecessary because of the existence of civil remedies, and then argue that civil remedies are unavailable in a given situation because the exclusionary rule would not be applied thereto. There was a time when the exclusionary rule was not applied at all; and, to the extent that any steps have been taken to limit the application of that rule, each such step emphasizes the importance of, and need to preserve, the vitality of the civil remedy.

Once it is clear that standards employed in determining the applicability of the exclusionary rule do not govern damage suits, then it seems plain that determination of liability of one who receives and transports documents illegally seized by others must depend upon what the receiver did. Was he nothing but a passive recipient or was he an active intervenor in the process?

Judge Leventhal's opinion points up the significance of Mr. Brick's participation in this matter:

"This case is shaped by appellants' position in the pleadings. It does not involve, nor require probing what legal consequences would be appropriate for, an instance of a truly passive receipt by Subcommittee personnel. This is not a case where appellants had nothing more to do with the seized documents than to be in the office at a time when, without prearrangement, Ratliff spontaneously either deposited the documents on Brick's desk in the Subcommittee office in Washington or disclosed their contents to the public at large. The pleadings before us are entirely congruent with the situation as presented in the stipulations of counsel for the McSurelys and the United States in an earlier case and Ratliff's testimony at the contempt trial, that the inquiry was initiated by the Subcommittee, and that Brick took active steps to obtain access to the seized materials and cart back from Kentucky to Washington copies of the McSurelys' documents, including two separate visits to the walk-in vault room where the originals were stored. Appellants' counsel contend that Brick 'played no role in the selection of the documents he would be given.' Brick's own testimony at the contempt trial indicates that his activites included some discretion in selection of what he examined and re-examined. Moreover it cannot rightly be put that there is no claim within the cognizance of the Fourth Amendment because of the co-operation of the custodian. Cooperation of a custodian without authority to grant access may obviate use of force, but it does not validate an otherwise unlawful search and seizure." (Pet. App. 24a-26a; footnotes omitted.)

Mr. Brick was anything but a passive unknowing participant. He is charged in the pleadings with being in active conspiracy with the other federal defendants and with Mr. Ratliff to intimidate and harass the McSurelys to prevent them from continuing their activities in Eastern Kentucky and to obtain personal papers of Mrs. McSurely for the private purposes of Senator McClellan. All of the specific acts subsequently described are claimed to be part of this conspiracy (A.30). Supplementing Judge Leventhal's discussion, we note that while Mr. Brick tried to give the impression that he played no part in the selection of the papers given to him, the record shows that the Kentucky officials had a conversation with Mr. Brick before they culled through the massive material to select the 234 documents which they gave him the following day (supra, n. 9). And if all that the Kentucky officials discussed the preceding day was that "the materials seized from [the McSurelys] ... contained references to a meeting immediately preceding a riot in Nashville, Tennessee, and to organizations suspected of instigating riots" (Gb4), why is it that the 234 documents selected after that discussion have little or nothing to do with those subjects but instead are heavily weighted with personal material relating to Mrs. McSurely? (Supra, p. 12.)

So far as we know, the "silver platter" doctrine developed before Elkins v. United States, 364 U.S. 206 (1960), was applied only to "exclusionary rule" cases and was not applied to any determination of liability for damage by those participating in either the first seizure or the subsequent use of illegally-seized documents. But even in the "silver platter" days, certain types of cooperation between the two takers short of actual

participation in the seizure implicated all takers as a team and the exclusionary rule was held applicable, Lustig v. United States, 338 U.S. 74 (1949); and see Kamisar, Wolf and Lustig, "Ten Years Later: Illegal State Evidence in State and Federal Courts," 43 Minn. L. Rev. 1083 (1959). Moreover, when the first taker was performing no law enforcement function of his own but was merely serving the interests of the second taker, "silver platter" did not apply, Gambino v. United States, 275 U.S. 310 (1927). At the time Mr. Ratliff and his team started working with Mr. Brick, they had lost their case and were not appealing. What independent law enforcement function were they then performing?

The pleadings here charge an active and ongoing conspiracy involving Mr. Ratliff and all four federal defendants to continue a program of harassing the McSurelys to prevent them from continuing their activites in Kentucky; to obtain all their papers, including their personal papers, for the private purposes of Senator McClellan, and to obtain membership lists of organizations seeking to enforce minority rights despite rulings of this Court protecting such lists; and to use the device of a Subcommittee investigation to discredit individuals and organizations working for impoverished citizens (A.30-31).

The Amended Complaint then in essence charges that, purusant to and as a part of this conspiracy, Mr. Brick affirmatively reached out for the McSurely papers and took them to Washington where he exhibited them to persons unknown, to the damage and embarrassment of the McSurelys (A. 31-32). The Complaint also charges a plot to conceal the surreptitious taking of papers by seeking to obtain them by a subpoena before the

McSurelys could act (A.32). This is not the kind of passivity which is at the heart of "silver platter" even if that doctrine were applicable to a damage action.

But there is one feature of this case which completely takes it out of the atmosphere of innocence sought to be developed by the government: Mr. Brick's taking the material in the teeth of the safe keeping order of September 14, 1967, in Judge Leventhal's words "makes all the difference in the world" (Pet. App. 46a).

It is inconceivable that even where the aggrieved citizen has gone to court to obtain relief from an unlawful seizure, has obtained an adjudication that it was indeed unlawful, and has an order of a court that the items be kept in safe keeping, that nevertheless an employee of another agency or sovereignty does not commit an independent Fourth Amendment violation when he reaches out for, and surreptitiously obtains, the documents which were supposed to be in safe keeping. To so hold makes a mockery of the judicial process, the only remedy available to the citizen who has been victimized by unlawful search and seizure. As pointed out above, Calandra emphasized that the citizen who was the object of an unlawful search was not "left remediless." "He may," said Mr. Justice Powell, "seek the return of the illegally seized property," 414 U.S. 338, 354, n. 10. And if he does, and obtains a court order for the safe keeping of his property, can it be that no new violation of his rights has been effected when another official secretly takes the seized property behind the back of the court?

At issue is public confidence that resort to judicial remedies can be useful. Surreptitious inter-governmental shuffling of illegally seized

papers cannot be allowed to continue unabated where the citizen has sought and obtained relief from the courts to protect his constitutional rights.

In its brief, the government analyzes the matter of violation of that order as if it were solely a question of possible vicarious liability on the part of Mr. Brick for Mr. Ratliff's violation of the order (Gb38). The government's presentation both misstates and skews the record and overlooks the full significance of the litigation to effect the return.

As to the record, the government overlooks that the pleadings in this case assert a continuing conspiracy between Mr. Brick and Mr. Ratliff which would impose direct responsibility on Mr. Brick for violation of the court order in addition to that which would also flow from F. R. Civ. P. 65(d), acknowledged by the government at Gb39, n. 27. The government says in that note, with no citation, that "Brick was not Ratliff's agent or catspaw." The pleadings, however, charge Mr. Brick directly with being a co-conspirator of Mr. Ratliff's. The government repeats its version of a highly disputed fact: "Brick played no role in the selection of these copies" (Gb40), but see supra, p.11, n. 9; p. 34. Assuming these differences are material, they can be resolved only by a trial.

The government states that, "Brick did not learn of the 'safe keeping' order until after he had received the copies furnished by Ratliff and Scott" (Gb40). But what did he do when he did learn of the order? Did he return the papers directly after he saw the order, so that his previous taking could be attributed to an "error"? No, he took them to Washington and kept them for 13 months

while the McSurelys litigated the force of a court order which had already determined that their documents had been taken illegally.

The full significance of the court's ruling of September 14, 1967, was that it was an adjudication of illegal taking in a litigation where the McSurelys specifically demanded return of their papers. 38/

Both Judge Wilkey (Pet. App. 72a et seq.) and the government (Gb39) have engaged in an extremely parsimonious reading of the September 14, 1967, order. They have read it for loopholes rather than for sense. We submit that such readings, aside from the fact that they are plainly incorrect (Pet. App. 27a-30a), seem to miss the point.

Let us suppose for a moment that there had been no order of September 14 and that the Kentucky District Court was considering an application for a return of the papers. Should not the mere pendency of the proceeding have been sufficient to stop inter-sovereign shuffling of illegally seized papers? The McSurelys had, after all, submitted their issue to the court and the matter would at least be sub judice. Would not Mr. Brick's taking of the documents even in such a circumstance have been enough to have established him as an active - not a passive - figure in the totality of the denial of the McSurelys' rights?

38/ The Complaint, which sought an injunction against the prosecution, also included a demand for an order "directing the appropriate defendants, their agents, servants, employees and attorneys and all others acting in concert with them to account to plaintiffs for the property seized from them or some of them from the home of the individual plaintiffs on the night of August 11-12, 1967, and to return said property forthwith to the appropriate plaintiffs." See jurisdictional statement, McSurely v. Ratliff, No. 1113, October Term, 1967, 40a.

In the face of the order, however, it is simply not possible to view one of the shufflers as anything but an active participant, liable in damages for his own contribution to the denial of constitutional rights.

B.

The McSurelys' right to privacy was violated.

Judge Leventhal was of the view that, separate from their Fourth Amendment claim, the McSurelys could have a valid claim of breach of their right of privacy, if not under federal law as a constitutional tort, then certainly under local law. In respect to the latter he pointed out that such a claim would be triable in the federal court under principles of pendent jurisdiction, citing United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (Pet. App. 53a).

Judge Wilkey argued that under Paul v. Davis, 424 U.S. 693 (1976), there was no constitutional basis for a claimed breach in privacy.

The government's brief substantially ignores the right of privacy claim, as it did the Fourth Amendment issue.

The American Law Institute Restatement of the Law of Torts has identified four different ways in which (at least as of this time) the right of privacy may be invaded. One of them is defined as "unreasonable intrusion upon the seclusion of another, as stated in Sec. 652B." That section reads as follows:

> "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."

Paul v. Davis, supra, held that defamation by a state official in the performance of his duties did not effect a deprivation of rights of "liberty" or "property" protected by the Due Process Clause. The Court was careful to limit its opinion to defamation arising out of official disclosure of a fact; obviously it did not hold that other breaches of privacy might not rise to the level of constitutional tort. And the American Law Institute Restatement carefully differentiates invasion of the right of privacy which results from "intrusion upon seclusion," as set forth above, from such invasion as results from publicity given another's private life, which is covered by Sec. 652D.

Here the breach of the right of privacy involved not defamation but the taking and dissemination of copies of intimate papers. If for some reason the Court should consider that the taking did not constitute a Fourth Amendment violation, nevertheless the taking and dissemination clearly involve an intrusion into private affairs. Moreover, in this case the intrusion was effected by the taking of property - copies of intimate correspondence - and is to that extent wholly different from the circumstance considered in Paul v. Davis.

The fact that the Court held that one's reputation is not property protected by the Due Process Clause obviously does not mean that one's papers are not property. Nor need we be detained by the question whether the taking of copies of papers constitutes a taking of property. The government resolved that question in the Ellsberg case (United States v. Russo, et al., U.S.D.C., Central Dist. Ca., No. 9373-WMB-CD) when it charged the defendant with having stolen government property by

taking copies thereof. 39/

Since the Amended Complaint charges that property was thus taken from the McSurelys by the federal defendants, the case may be analyzed either as a denial of a right of privacy or as a classic form of the taking of property. In either event, Paul v. Davis is inapplicable.

Lastly, from the point of view of the application of the Speech or Debate Clause to investigatory activities of Congress, it matters not whether the breach of constitutional rights is of the Fourth Amendment, the Fifth Amendment, or the right of privacy. This Court has indeed said:

> "On the other hand, no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen." Gravel v. United States, supra, 408 U.S. at 621, underscoring supplied.

We do not deem it necessary to add to Judge Leventhal's comment with respect to pendent jurisdiction if the denial here of the right of privacy were to be considered a non-constitutional tort (Pet. App. 52a-53a).

39/ The government's point in Ellsberg, supra, was that it was the "information contained" in the papers which constituted government property, so that the taking of copies of government papers constituted a taking of government property. See, United States v. DiGilio, 538 F. 2d 972, 977 (3rd Cir., 1976), and Report of the Senate Judiciary Committee referred to in n. 9 (ibid.).

IV.

THE SPEECH OR DEBATE CLAUSE DOES NOT IMMUNIZE NON-LEGISLATIVE CONDUCT WHICH VICARIOUSLY CAUSES A DENIAL OF CONSTITUTIONAL RIGHTS; IN ANY EVENT, THE DEFENDANTS HERE ACTED DIRECTLY, NOT VICARIOUSLY; NOR DOES THE SPEECH OR DEBATE CLAUSE IMMUNIZE PRE-SUBPOENA SEIZURE OF PAPERS ON THE THEORY THAT, THOUGH IRRELEVANT, THEY MAY LEAD TO RELEVANT DATA.

A.

There is no special rule protecting legislators merely because they act vicariously.

The government makes the following argument:

> "Even if Senator McClellan had explicitly instructed Brick to act as he did, he still would be protected by legislative immunity" (Gb34).

As authority, the goverment cites Kilbourn v. Thompson, Doe v. McMillan, and Powell v. McCormack, all supra. The government then continues:

> "Senator McClellan's role in authorizing Brick's investigation therefore cannot be the basis of liability. If, as Kilbourn and Powell establish, Members of Congress are not liable even for issuing explicit directions that other persons act in a way that violates the Constitution, surely they are not liable for simply not supervising congressional employees sufficiently to prevent misconduct." (Gb35.)

The government then carries the argument further and, having developed a general theory of legislative immunity for vicarious conduct, it

contends that the same theory "should apply equally to the question whether one legislative employee may be vicariously liable for the acts of another" (ibid.).

This entire argument is founded on a misreading of the cases which the government cites and a failure to note the careful analysis made in Gravel v. United States which we discussed supra, p. 59.

A legislator is not liable for the unconstitutional acts of his subordinate if the act of the legislator in directing the conduct is itself a legislative act - and that is exactly what Kilbourn, Doe, and Powell hold. 40/ Legislators do not, however, have a special kind of immunity for vicarious liability if their directive acts are non-legislative.

In Kilbourn, Powell, and Doe, the legislators could not be held liable for voting an invalid resolution since voting was clearly a legislative act, though their employees could be held liable for implementing an invalid resolution since the implementation was clearly not a legislative act.

There is no general rule that legislators have a special exemption from normal rules of vicarious responsibility which apply to all citizens; the Speech or Debate Clause comes into play only when the particular conduct with which they are charged is a legislative act, such as a vote.

If Senator McClellan directed Mr. Brick to search and seize the McSurely papers before a

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40/ In Kilbourn and Powell, the legislative act was voting on a resolution. In Doe, the act was also voting in the House, "sitting as a committee of the whole House," see 412 U.S. at 341; and see reference to "non-legislative directives" in Doe v. McMillan, 412 U.S. at 315.

subpoena issued - and that is what the Amended Complaint in essence charges - and if, as we argued above, Mr. Brick's conduct did not constitute a legislative act - then clearly neither was the Senator's. He did not vote or speak on the floor or in committee. He acted completely on his own and outside of the kind of conduct which commands legislative immunity under the Speech or Debate Clause.

The idea that legislators and their aides have special rights applicable to them when they work through others is the same kind of pernicious perversion of the Speech or Debate Clause which the courts have rejected. Suppose it were not a search and seizure; suppose it were a physical assault (the McSurelys, it will be recalled, allege that they were bombed out of Pikeville [A.36]), which some legislator thought would assist in the performance of his "investigative activity," and the legislator directed someone to do it for him. Does the government seriously contend that anything in the Speech or Debate Clause protects the legislator because he acted through an agent and not directly?

B.

In any event, the record clearly charges direct, not vicarious, involvement by defendants McClellan, Adlerman and O'Donnell.

The government argues (Gb34) that "Senator McClellan is immune for his role in authorizing the investigation" and then blandly states that "the record therefore shows no more than that Senator McClellan authorized in general terms Brick's investigatory activity" (ibid.).

But on this record, the charges against Senator McClellan go far beyond a mere matter of generally authorizing Mr. Brick to act.

Thus, it plainly appears on the record that the Senator became personally involved in the treatment of what was obviously the prize of the entire seizure: "Dearest Cucumber." He was not content to allow Mr. Brick to determine what to do with it. He did not order Mr. Brick to send it back; he took control and directed that it should be kept. If there were even a hint that the Senator was using this material as part of legitimate legislative business, there might be a different situation. But the record is barren of any such suggestion. In any event, on this record, the government can not sustain its characterization of the charge against the Senator as being based exclusively upon his authorization of the investigation.

In fact, the Complaint in this case charges that before the time Mr. Brick showed him the letter, the Senator was involved in a conspiracy with Messrs. Brick, Adlerman, O'Donnell, and Ratliff, part of which included the taking and transporting of papers which were subject to the safe keeping order of September 14, 1967, and which Mr. Brick has conceded were unrelated to legislative activity. Senator McClellan's carefully drafted affidavit denies involvement in any conspiracy in respect to the original "illegal police raid" conducted by Mr. Ratliff (A. 49, par. 4). His affidavit carefully does not dispute that he was involved in a conspiracy with Messrs. Brick and Ratliff in respect to the subsequent inspection and taking of the materials to Washington. He carefully does not dispute the allegations of the Complaint that one of the objects of the conspiracy was

to intimidate the McSurelys and persons with whom they were associated for the "private purposes of defendant McClellan" (A. 41). 41 / And the allegations of the Amended Complaint are specifically supported by an affidavit of the McSurelys (see A. 55, par. 4) which also disputed each and every allegation of the McClellan affidavit.

The government characterizes Senator McClellan's affidavit as stating "that he participated in the events described in the complaint only as Chairman of the Subcommittee, authorizing the Subcommittee's investigation" (Gb34). In fact, the affidavit does not even do that; the affidavit ignores the allegations of the Complaint which made specific charges that the Senator was directly and personally involved in a conspiracy with Messrs. Brick and Ratliff to take the McSurelys' papers before a subpoena issued.

The government argues for the same misreading of the record in the case of Messrs. Adlerman and O'Donnell as it seeks for Senator McClellan. In fact, the defendants Adlerman and O'Donnell are not charged with vicarious responsibility; the allegation against them, as against Senator McClellan, is that they were personally and directly involved in a conspiracy with Mr. Brick.

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41 / Senator McClellan's affidavit appears to seek his own exoneration by setting forth Mr. Brick's testimony that it was the Senator who ordered Brick to retain "Dearest Cucumber" under lock and key. Of course, if the objective was to intimidate Mr. Pearson, holding the letter as a sword of Damocles, rather than publicizing it, would obviously have maximum intimidative effect.

C.

Brick has no legislative immunity for his conduct.

As explained above, the government avoids discussing the Fourth Amendment or right of privacy issue in terms of the analysis suggested by Judge Wilkey. Instead, it seeks immunity for Mr. Brick in respect to his own conduct by two readings of the Speech or Debate Clause, neither of which has validity.

1. Brick, like his colleagues, cannot claim non-liability for allegedly vicarious acts.

It is argued that holding Mr. Brick liable because he violated the safe keeping order of September 14, 1967, "would be yet another form of vicarious liability," which the government claims is somehow inconsistent with the Speech or Debate Clause (Gb39). But as we pointed out above, this theory that the Speech or Debate Clause somehow prohibits vicarious liability for non-legislative acts has no foundation whatever. "The Speech or Debate Clause [does not] insulate[s] legislative functionaries carrying out ... nonlegislative directives," Doe v. McMillan, supra, 412 U.S. at 315. If Mr. Brick's pre-subpoena taking of the papers from Mr. Ratliff was, as we noted supra, a non-legislative act, then the immunity of the Speech or Debate Clause is simply not applicable to the claims which have been made against him. Additionally, since Mr. Brick had notice of the order, it was beinding upon him (Gb39, n. 27). Lastly, Mr. Brick, as in the case of the other defendants, is not alleged to have acted vicariously; rather, he is charged with being in a direct

conspiracy with Mr. Ratliff and the others.

2. The Speech or Debate Clause does not create an immunity for non-legislative acts which produce irrelevant material on the theory that ultimately relevant material might turn up.

It is argued that "liability on account of the selection and transportation of irrelevant documents is inconsistent with Doe and Servicemen's Fund" (Gb40). The flaw in this argument (as in the case of the vicarious liability argument) is that it seeks to apply to non-legislative acts principles of immunity that are properly applied only to legislative acts.

It may well be, under Servicemen's Fund, that if a subpoena is issued for irrelevant material, no liability can attach therefor. Similarly, the Congressional printing of a report, as in Doe - exactly like a speech on the floor of the House - is a legislative act and the courts are indeed barred from questioning its content. But pre-subpoena taking of a private citizen's papers is not a legislative act, hence there would simply be no immunity for that conduct even if the papers were relevant to something that a Congressional committee was investigating.

The test of immunity is not whether some fanciful theory of relevance of the documents can be conjured up; the test is whether the taking of the papers (relevant or not) was a legislative act. The irrelevance of the papers - in this case, admittedly so - is not critical to a determination that there was no legislative act. It does, however, remove any last vestige of argument on that score.

The government's argument is nonetheless helpful in making clear just how extreme is its position. We noted above that the government's contention that pre-subpoena activities constitute legislative acts means that an army of legislative employees would be authorized to operate beyond the law. The government here emphasizes how far beyond the law they may operate. They would be given carte blanche to enter any home, seize any papers, break into any file, tap any telephone, while pursuing some investigation or other "on which legislation could be had" (Gb43). Anything they do or take would be justified because, after all, "an investigator must be aware that seemingly irrelevant documents might contain clues to the location or content of other documents that would be more apparently pertinent" (Gb41). Such an argument should be enough to confirm the critical danger of extending immunity to conduct which does not constitute a legislative act in its strictest sense.

V.

THE DEFENDANTS HAVE NOT MOVED FOR SUMMARY JUDGMENT ON THE GROUND OF THE ABSENCE OF ANY GENUINE ISSUE AS TO ANY MATERIAL FACT AND, IN ANY EVENT, THE RECORD WOULD NOT SUPPORT SUCH A MOTION.

The government argues (Gb37) that Senator McClellan and defendants Adlerman and O'Donnell were entitled to summary judgment because, so it claims, the record does not have adequate sworn facts to support the McSurelys' claims of the involvement of those defendants with Mr. Brick's activities. In support of this contention the government cites Dombrowski v. Eastland, supra.

Analysis of the record here - and a comparison with that in Dombrowski - makes clear that the government's claim cannot be supported.

The original motion to dismiss or, in the alternative, for summary judgment (A.45) lists three grounds: Speech or Debate; failure to state a claim; and collateral estoppel. Each of them plainly presented a question of law. The motion for reconsideration (A.148) added the request that the court certify "the issue whether the defendants are officially immune with respect to the allegations in the Complaint."

The motion thus, while termed as being in the alternative for summary judgment, is in essence one for dismissal under Rule 12(b)(6). Since the government supported its motion by an affidavit - that of Senator McClellan - Rule 12 would bring the motion under Rule 56. Significantly, the motion by the government did not even allege

that there was no genuine issue as to any material fact.

The motion was supported by one affidavit - that of Senator McClellan. There was no affidavit by either Mr. Adlerman or Mr. O'Donnell. Thus, the record before the Court is as follows:

a) As to Senator McClellan, there are well pleaded allegations in the Complaint that he was directly involved in a conspiracy with Messrs. Ratliff and Brick which included all of Brick's actions; those allegations are supported by the McSurely affidavit (A. 54) and are not disputed by the McClellan affidavit (A. 47).

b) As to Messrs. Adlerman and O'Donnell, the same sworn allegations are made against them and they have filed no affidavits at all.

In relying on Dombrowski, the government would have the Court ignore the vast difference between the two cases in terms of the nature of the records. It asks this Court to grant a motion for summary judgment against the McSurelys as to some of the defendants because the McSurelys have not yet presented their proofs in detail - when there has been no occasion to do so.

In Dombrowski, by contrast, the motion expressly asserts (after moving for dismissal for failure to state a claim) that the defendants alternatively moved for summary judgment on the ground that seven accompanying affidavits and a deposition "show there is no genuine issue as to any material fact." 43/ In this case there is a single, quite

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43/ See "Motion to Dismiss or, in the Alternative, for Summary Judgment," Joint Appendix, Court of Appeals for the District of Columbia Circuit,
[Footnote continued on next page.]

general affidavit by Senator McClellan which does not dispute his involvement in Mr. Brick's activities and says nothing about the involvement of the defendants Adlerman and O'Donnell in those activities.

The government can hardly assert that "[r]espondents were required to show, if they could, that they would be able to prove involvement" (Gb37) when the defendants had failed to put that matter in issue by their own affidavits.

As this Court said in Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962):

> "We look at the record on summary judgment in the light most favorable to ... the party opposing the motion... Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"

Even in Dombrowski, where extensive affidavits were submitted, one federal defendant was kept in the case. 44/ Certainly there is no room for summary judgment upon the single affidavit here submitted.

[Footnote continued from previous page:]
Dombrowski v. Burbank, #18435, #18544 (15a). The impact of these affidavits was set forth in the government's brief in Dombrowski before this Court, #118, October Term, 1966, pp. 20-22.

44/ Mr. Sourwine, as distinguished from the Senator, was kept in the case because there was some factual issue in the record as to him. Dombrowski v. Eastland, supra, 387 U.S. at 84. No such distinction can be drawn in this case between the Senator and Messrs. Adlerman and O'Donnell since the allegations of involvement with Brick's activities are the same as to all of them.

VI.

THE COURT OF APPEALS PROPERLY RULED THAT, UPON REMAND, THE DISTRICT COURT SHOULD CONSIDER ALLEGATIONS WITH RESPECT TO THE POSSIBLE DISTRIBUTION OF McSURELY MATERIALS TO THE INTERNAL REVENUE SERVICE.

A.

On the state of the pleadings, remand was proper.

The government argues that the Court of Appeals should not have dealt with the Internal Revenue Service (IRS) claim because, so it says, "[r]espondents' complaint does not allege that private documents were disseminated to the IRS" (Gb44). But the complaint was not required to make a specific allegation as to the place to which dissemination was made.

The Complaint did allege exhibition of the documents "to persons whose names are unknown to the plaintiffs, to the damage and embarrassment of the plaintiffs" (A. 31-32). There is hardly any doubt but that with such an allegation the McSurelys at trial would be entitled to prove dissemination to the Internal Revenue Service. We do not comprehend the government's claim that "[t]his allegation does not appear to encompass dissemination by a Subcommittee within the government" (Gb44, n. 31).

The claim that the defendants are entitled to summary judgment (ibid.) because Mr. Brick in the criminal trial denied distributing the material and the same was not controverted is equally beyond comprehension. The responsive affidavit of the McSurelys expressly controverted Mr. Brick

on this point (A. 56, par. 8).

The McSurelys were prevented from taking depositions of Mr. Brick by stays which were not lifted until he had become terminally ill. They did not know at the time they filed their original affidavit what they have ascertained as a result of a Freedom of Information Act disclosure and that is indeed why they filed their supplemental affidavits. Plainly, they should be permitted to ascertain and present the facts, and that is all the Court of Appeals decided.

The government is critical of the McSurelys for not earlier having obtained the facts which the government kept secret, so that they could more specifically dispute Mr. Brick's testimony given in 1970. What is far more striking is that after the Court of Appeals permitted the filing of two supplemental affidavits of the McSurelys in 1974, which strongly indicated that there had been dissemination of documents to the IRS, the government filed no affidavit from either the IRS or the Committee disputing the same. 45/

The government claims that "the District Court had no occasion to, and therefore did not, pass on the sufficiency of a claim of dissemination or the extent of legislative immunity with respect to such a claim" (Gb44-45). Precisely because the detailed facts had not been spelled out (though a more than adequate allegation was made in the Complaint to encompass the matter), the Court of

45/ On January 24, 1975, the government filed in the Court of Appeals "Appellants' Response to Appellee's Supplemental Submission." This was a five-page memorandum of argument. No affidavits were filed.

Appeals properly remanded the matter to the District Court for determination of both factual and legal issues (Pet. App. 44a, par. 5).

B.

The government has misstated the record as to when the dissemination to the IRS commenced or is alleged to have commenced.

The government says (Gb45):

"Respondents' affidavits state that the exchange of documents between the Subcommittee and the Internal RevenueService commenced in August 1969 (A. 57-58). But it appears to be undisputed that Brick returned all of the copies of respondents' documents in the Subcommittee's possession to state officials on August 14, 1968, more than a year before the exchange of information began."

This is a plain misstatement of the record. Aside from the fact that the McSurelys did expressly dispute Mr. Brick's claim that he returned all copies of the documents on August 14, 1968 (A. 56, par. 8), the government has completely ignored the second supplemental affidavit of the McSurelys dated December 2, 1974 (A. 65).

That affidavit was filed after a second disclosure by the government. The McSurelys there explained that at the time of the submission of their first affidavit "it appeared that the relationship between those two groups [the McClellan Committee and the IRS] was generated on March 5, 1969" (A. 65, par. 4). They then explain that as a result of the second disclosure, they learned that the relationship was established in the summer of 1968 and that it appeared that there had been a

dissemination at that time. For the government under these circumstances to state that "[r]espondents state the exchange of documents" commenced in August, 1969, is a misstatement of the record.

C.

There is nothing at common law or under the Speech or Debate Clause which immunizes a legislator or legislative staff person who, having illegally acquired papers, then distributes that material.

The government seems not to perceive the impact of distribution of the material to the IRS. Firstly, it suggests that there is no violation of a right of privacy because there was no public dissemination. We pointed out above (p. 81) that the right of privacy may be invaded without a public dissemination.

Secondly, it is obvious that a search and seizure is aggravated by distribution - even non-public - and would certainly be a factor to be considered in connection with a damage claim for the search.

Doe v. McMillan, supra, effectively removes the Speech or Debate Clause as an operative, unqualified privilege in respect to distribution of materials outside the halls of Congress. And Doe dealt with distribution of materials which were public because they were in any event printed for use in Congress. Moreover, there was no suggestion that the material in Doe was illegally obtained. Certainly, in the light of Doe, there can be no Speech or Debate privilege for the distribution outside of Congress of non-public, illegally obtained papers.

Despite Doe, the government projects a theory of a Speech or Debate privilege of legislative

officials to exchange information with the executive branch of the government (Gb47). But distribution of legislative materials to executive agencies is no more a legislative act than is importuning an administrative agency on behalf of a constitutent. United States v. Johnson, supra. Such actions cannot be considered "an integral part of the deliberative and communicative process."

There is also a suggestion that, independent of the Speech or Debate Privilege, there is a general privilege for dissemination of information to law enforcement officers (Gb46). But it cannot be seriously contended that an official who effects an unlawful search and seizure is privileged to compound the effects of that conduct by having colleagues in the government share the fruits of illegality. We do not address the liability of the recipients, or the use that may be made of the material by them. Cf., United States v. Janis, supra. Our concern is solely the question of liability of the transferor and whether there is an absolute privilege with respect thereto, which would bar a trial. Even if there were some kind of privilege of legislators to communicate facts to the executive, plainly it would be a qualified privilege subject to a trial to determine a wide range of questions as to scope of authority, relevance of the transmitted material, etc. In any event, the pleadings here raised only the issue of the Speech or Debate privilege and the Court of Appeals properly remanded to the District Court the determination of all issues relating to dissemination to the IRS.

CONCLUSION

The en banc judgment of the Court of Appeals should be affirmed.

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